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The Community Property Law in Washington

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THE COMMUNITY PROPERTY LAW IN WASHINGTON

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I. INTRODUCTION

Nineteen years have passed since the author wrote a modest summary of principal propositions in Washington community property law.[1] There have been changes and refinements during that period;[2] hence, this "second edition."

Community property law in the United States is principally of Spanish origin.[3] Washington, however, has no history of significant contact with Spanish culture, as do many of the eight community property states.[4] Nonetheless, Washington's community property system may derive from a Spanish source, via California, whose laws apparently furnished the principal model for the territorial laws in Washington.[5]

In contrast to the philosophical premise of the common law system, in which the wife's juridical personality is submerged into that of her husband at the time of marriage,[6] the marital property relationship in the community property system may be regarded as a type of partner-

1. Cross, *The Community Property Law in Washington,* 15 LA. L. REV. 640 (1955).

2. The most significant change occurred in 1972 when the Washington Legislature amended the community property statute to establish equality between the husband and wife in regard to their community property. For an analysis of these amendments, *see* Cross, *Equality for Spouses in Washington Community Property Law–1972 Statutory Changes,* 48 WASH. L. REV. 527 (1973). The Washington approach may not be the most desirable; several are discussed in Comment, *Equal Rights and Equal Protection: Who Has Management and Control?* 46 S. CAL. L. REV. 892 (1973). *See also* Bingaman, *The Effects of an Equal Rights Amendment on The New Mexico System of Community Property: Problems of Characterization, Management and Control,* 3 N. MEX. L. REV. 11 (1973); Comment, *The Equal Rights Amendment and Inequality Between Spouses Under the California Community Property System,* 6 LOYOLA L. REV. (Los Angeles) 66 (1973).

3. W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY ch. 4 (2d ed. 1971) [hereinafter cited as DEFUNIAK & VAUGHN].

4. The other states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico and Texas. The community property system in various forms exists in many other countries. *See* DEFUNIAK & VAUGHN §§ 13–18. There was a flurry of adoptions of community property laws in other states during a decade in which income tax advantages were sought, followed by repeals when the federal tax laws permitted splitting income by means of joint returns. *Id.* § 53.1.

5. *See generally id.,* at 46–47. The 1869 Washington statute was repealed in 1871 and a marital partnership act substituted, the latter was repealed in 1873 and five days later the 1869 act was restored; principal modifications were made in 1879 to the form that remained substantially unchanged until 1972 (minor modification was made in 1881). The historical development of Washington community property law is summarized in Hill, *Early Washington Marital Property Statutes,* 14 WASH. L. REV. 118 (1939).

6. For example, Blackstone wrote in 1765 that: "By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 1765–69. *See generally* DEFUNIAK & VAUGHN §§ 1, 2.

ship.[7] Although spouses in the community property system are not possessed of the rights and liabilities of ordinary business partners, each spouse is regarded as contributing equally to and sharing equally in the economic well-being of the marital enterprise.[8] The fundamental principle of the community property system is thus more in line with the principle of the proposed federal Equal Rights Amendment[9] than is the "unity of husband and wife" principle underlying the common law system. While the detailed operations of the eight states' community property systems do not necessarily satisfy the requirements of that proposed amendment,[10] the 1972 statutory changes in Washington, a purpose of which was "to establish equality between the husband and wife in regard to their community property,"[11] probably do meet "equal rights" standards.[12]

7. *See* DEFUNIAK & VAUGHN § 1.

8. Equality is the cardinal precept of the community property system. At the foundation of this concept is the principle that all wealth acquired by the joint efforts of the husband and wife shall be common property; the theory of the law being that, with respect to marital property acquisitions, the marriage is a community of which spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution. DEFUNIAK & VAUGHN § 1 at 2–3.

9. H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971):

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

(Proposed 27th Amendment.)

10. For an excellent analysis of the issues presented by the proposed amendment, *see* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L. J. 871 (1971); Symposium, *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment,* 6 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 215 (1971).

For a discussion of the impact of the Equal Rights Amendment upon community property jurisdictions, *see* Comment, *Equal Rights and Equal Protection: Who Has Management and Control?,* 46 So. CAL. L. REV. 892 (1973); Bingaman, *The Effects of an Equal Rights Amendment on The New Mexico System of Community Property: Problems of Characterization, Management and Control,* 3 N. MEX. L. REV. 11 (1973); Ellis, *Equal Rights and the Debt Provisions of New Mexico Community Property Law,* 3 N. MEX. L. REV. 57 (1973); Comment, *The Equal Rights Amendment and Inequality Between Spouses Under the California Property System,* 6 LOYOLA L. REV. (Los Angeles) 66 (1973); and Comment, *Community Property: Male Management and Women's Rights,* 1972 LAW & THE SOCIAL ORDER 163.

11. Cross, *Equality for Spouses in Washington Community Property Law–1972 Statutory Changes,* 48 WASH. L. REV. 527, 531 (1973).

12. The requirement exists locally through WASH. CONST. art 31, adopted in the November 1972 election:

Sec. 1 Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

Sec. 2 The Legislature shall have the power to enforce, by appropriate legislation, the provisions of this Article.

Washington's present community property regime, with the major exception of the 1972 amendments, has remained largely unchanged in its basic structure since enactment by the territorial legislature in 1879.[13] The statutes, in two separate sections,[14] provide that property and pecuniary rights owned by each spouse at the time of marriage, any property thereafter acquired lucratively,[15] and the rents, issues and profits therefrom constitute separate property. All property acquired after marriage which is not separate property is community property.[16]

With the 1972 changes now in effect, each spouse has equal management power over the community property. Each spouse has a general inter vivos power to dispose of the community personal property,[17] but neither *alone* can acquire, convey, or encumber community real property,[18] convey or encumber community household goods,[19] or purchase or transfer community business assets in some situations.[20] Each spouse may devise or bequeath his or her half of the community property[21] and may deal in all respects with his or her separate property as if unmarried.[22]

The statutory skeleton outlined above is supplemented, of course, by a large body of case law interpreting, and filling in the lacunae between, these statutes. Before launching into the body of this article, the author feels obligated to comment generally on several themes underlying the development of this case law. The solicitude with which the Washington court has viewed the community property position, manifested in various rules and presumptions, is one rather constant theme: acquisitions by a spouse are presumptively community property; separate property commingled with community property becomes community property by operation of law; obligations incurred by a spouse are presumptively community in character; separate property agreements between the spouses must be established by a higher standard of proof than that required to establish commu-

13. *See generally* Hill, *Early Washington Marital Property Statutes,* 14 WASH. L. REV. 118 (1939).
14. WASH. REV. CODE §§ 26.16.010 & .020 (1963).
15. *See* note 75 *infra.*
16. WASH. REV. CODE § 26.16.030 (Supp. 1973).
17. *Id.* But neither spouse can make a gift of community property, personal or real, without the express or implied consent of the other. WASH. REV. CODE § 26.16.030 (2) (Supp. 1973).
18. WASH. REV. CODE § 26.16.030(3)(4) (Supp. 1973).
19. *Id.* § 26.16.030(5) (Supp. 1973).
20. *Id.* § 26.16.030(6) (Supp. 1973). Discussed in Part IV *infra.*
21. *Id.* § 26.16.030(1) (Supp. 1973).
22. *Id.* § 26.16.010 & .020 (1963).

nity property agreements, and so forth. Another theme, or perhaps more of an observation, is the relative independence and self-reliance of the Washington court in generating this body of case law. Only infrequently has the Washington court relied upon or even cited precedents from other community property jurisdictions. This inbreeding may help to account for the relative stability which Washington's community property system has enjoyed.

II. THE NECESSARY RELATIONSHIP

The Washington Supreme Court has said for an asset to be community property it is first necessary that a lawful marital relationship exist between the owners.[23] This proposition is inherent in R.C.W. § 26.16.030 which defines community property.[24] The validity of the marriage is determined by the law of the jurisdiction where the marriage occurred.[25] Thus, while Washington law does not recognize a common law marriage, such a marriage validly established in another jurisdiction is recognized in Washington as creating the necessary marital relation.[26]

The division of property acquired during cohabitation of a man and woman who are not validly married, either under Washington law or the law of another jurisdiction, raises special problems.[27] Such property is not community property, but nonetheless it frequently would be inequitable to deny that both parties to the relationship may possess interests in their acquisitions. Although some community property jurisdictions solve such problems by means of a "putative marriage" doctrine,[28] Washington does not. Under existing Wash-

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23. Poole v. Schrichte, 39 Wn. 2d 558, 236 P.2d 1044 (1951); *In re* Sloan's Estate, 50 Wash. 86, 96 P. 684 (1908).

24. The source Spanish law is the same, DEFUNIAK & VAUGHN § 55, at 94.

25. *See generally* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 168–70 (1971); R. LEFLAR, AMERICAN CONFLICTS LAW §§ 220–21 (1968); H. CLARK, LAW OF DOMESTIC RELATIONS 55–57 (1968); H. GOODRICH & E. SCALES, CONFLICT OF LAWS 380 (1962); Taintor, *Marriage in the Conflct of Law,* 9 VAND. L. REV. 607 (1956).

26. *See* State *ex rel.* Smith v. Superior Court, 23 Wn. 2d 357, 161 P.2d 188 (1945); Stans v. Baitey, 9 Wash. 115, 37 P. 316 (1894).

27. Cohabitation contemplates a relationship continuing over a period of time and not a short term "affair." *See, e.g.,* Creasman v. Boyle, 31 Wn. 2d 345, 196 P.2d 835 (1948), where the relationship at issue spanned seven years.

28. *See* DEFUNIAK & VAUGHN §§ 55–56.8. "A putative marriage . . . is a marriage which is forbidden but which has been contracted in good faith and in ignorance of the impediment on the part of at least one of the contracting parties." *Id.* § 56 at 96. *See also* H. CLARK, LAW OF DOMESTIC RELATIONS 52–52 (1968); Luther & Luther,

ington rules, the nonacquiring or nontitle-holding party to an innocent or to a meretricious relationship may be able to assert an interest in the acquisitions of the other.

A. The Innocent Relationship

In *Creasman v. Boyle*[29] the court defined and stated the principles governing innocent relationships:[30]

> . . . [E]ven though there be no lawful marriage . . . if either or both of them in good faith enter into a marriage with the other, or with each other, and such marriage proves to be void, a court of equity will protect the rights of the innocent party in the property accumulated by the joint efforts of both.

A relationship thus may be defined as innocent if the party to be protected believed in good faith that a valid marriage existed.

In *Poole v. Schricte*,[31] Mrs. Poole contended that her relationship with Mr. Schricte was innocent, rather than meretricious, since she believed that a common law marriage occured while the two lived together in Illinois during the first seven years of their 13-year relationship. The court held sufficient evidence had been presented to support her contention and that an innocent relationship had been established.

At issue in *Poole* were the rights of the parties in a tavern and in personal property acquired in Washington where they had lived together for six years without a formal marriage. The court found authority to divide the property acquired during their relationship upon the following reasoning:[32]

Support and Property Rights of The Putative Spouse, 24 HAST. L.J. 331 (1973); Comment, *The Putative Marriage Doctrine in Louisiana,* 12 LOYOLA L. REV. (New Orleans) 89 (1965); Comment, *Right of a De Facto Wife to Obtain a Share of Jointly Accumulated Property,* 2 WILLAMETTE L.J. 207 (1962); Comment, *Rights of the Putative and Meretricious Spouse in California,* 50 CAL. L. REV. 866 (1962).

29. 31 Wn. 2d 345, 196 P.2d 835 (1948), *noted* in 24 WASH. L. REV. 164 (1949). The plaintiff, Harvey Creasman, had lived meretriciously with Caroline Paul for a period of seven years until her death. Mr. Creasman was the breadwinner, but he left the management of their financial affairs to her. After her death, he sought to be adjudged the owner of real estate purchased with his funds. Title was placed in Mrs. Paul's name. The court held she was the owner.

30. 31 Wn. 2d at 352, 196 P.2d at 838.

31. 39 Wn. 2d 558, 263 P.2d 1044 (1951).

32. 39 Wn. 2d at 569, 236 P.2d at 1051. Other possibilities include application of trust principles or an analysis on the basis of a quasi-marital partnership.

> We agree . . . that the authority and jurisdiction of the court to divide the property accumulated during such a relationship is in consequence of the court's inherent equity power, and not because of the divorce statute. It is likewise our view that the court is not limited, under an equal partnership concept, to an even division of the property accumulated, but that the innocent party may be awarded such proportion of the property accumulated as would under all the circumstances be just and equitable.

Mrs. Poole was held to be owner of a half interest in the personal property and was allowed $5,000 for her interest in the tavern, apparently an evaluation of a half interest.

Equitable division of the accumulated property between the parties to the psuedo-marital relationship reflects the fact that in effect the innocent party is a tenant in common in such property with the other party, but this fact does not necessarily establish the size of the parties' respective shares. In other ordinary situations of multiple party acquisitions, a tenancy in common results when property is acquired with multiple contributions, and "courts will presume they intended to share the property in proportion to the amount contributed, where it can be traced, otherwise they share it equally."[33] This presumption could furnish a controlling analogy but it is not clear that it will or should. Under the cases, when the innocent party has *directly* contributed to the acquisition of the property before the court, apparently a precise measurement of the amount of the contribution is not required in order to conclude that the innocent party should be awarded at least one half.[34]

Special difficulty arises, however, where the contribution of the innocent party is *indirect, e.g.,* where one party has merely "run the home" and has not directly furnished the consideration for the asset. That such indirect contributions as "running the home" must be weighed in making the property division is recognized in *Knoll v. Knoll:*[35]

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33. West v. Knowles, 50 Wn. 2d 311 at 313, 311 P.2d 689 at 691 (1957), *citing* Iredell v. Iredell, 49 Wn. 2d 627, 305 P.2d 805 (1957).

34. *See In re* Brenchley's Estate, 96 Wash. 223, 164 P. 913 (1917) (woman kept boarders at a lodging house, and was a nurse and midwife; her earnings contributed to payment of purchase obligations); Powers v. Powers, 117 Wash. 248, 200 P. 1080 (1921) (proceeds from sale of her property furnished part of funds to buy property awarded to her).

35. 104 Wash. 110, 115, 176 P. 22, 24 (1918). The case was returned to the

> So long as the parties lived together as husband and wife, both labored in their respective fields, and the property acquired during this time was the result of their joint efforts.

The weight to be accorded such a contribution, however, is unclear; is it an equal "contribution," as it would be under the community property rules for married persons?[36]

It seems reasonable to start with the assumption that a proper division of the accumulated property would give the innocent party a half interest without particular regard to the nature of the "contribution." The final *equitable* division, however, will also reflect consideration of each party's future needs and continuing ability for self-support. For example, in *Buckley v. Buckley*,[37] where the man had deserted his wife and cohabited with another woman, and thus could hardly be considered the innocent party in the pseudo-marital relationship, the court said:[38]

> Bearing in mind that appellant Buckley accumulated this property, and that he is now sixty-six years old, in feeble health, requiring support, medical attendance, and nursing, we cannot say that the disposition of the property, as made by the trial court, was erroneous, inequitable, or unjust. [He received ½ of all real property accumulated during the relationship. Each of the two women received ¼.]

The infirm, needy innocent party should not fare less well. There is, however, no certainty about the factors to be considered or the weight to be given them in the court's equitable division of the property.

B. The Meretricious Relationship

In contrast to an innocent relationship in which at least one party possesses a good faith belief that a valid marriage exists, a meretricious relationship exists when both parties cohabit with knowledge that a lawful marriage between them does not exist.[39] Regarding mer-

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trial court, which had refused to rule on property rights, to permit the defendant to be heard on question of proper disposition of the property.

36. *See* note 8 *supra*.

37. 50 Wash. 213, 96 P. 1079 (1908).

38. 50 Wash. at 223, 96 P. at 1083.

39. *See* DEFUNIAK & VAUGHN § 56; H. CLARK, LAW OF DOMESTIC RELATIONS 52–54 (1968); Comment, *Rights of the Putative and Meretricious Spouse in California*, 50 CAL. L. REV. 886, 873 (1962). If one was innocent, but the other not, protection in

etricious relationships, the court declared, in *Creasman v. Boyle*:[40]

> . . . [P]roperty acquired by a man and woman not married to each other, but living together as husband and wife, is not community property; and, in the absence of some trust relation, belongs to the one in whose name the legal title to the property stands.

The court further stated what has become identified as the *Creasman* presumption:[41]

> We think that, under these circumstances and in the absence of any evidence to the contrary, it should be presumed *as a matter of law* that the parties intended to dispose of the property exactly as they did dispose of it.

Application of the *Creasman* presumption that ownership lies in the acquiring or title-holding party thus prevents division of the property accumulated during the relationship, often an inequitable result. In a number of cases, the *Creasman* presumption has been successfully rebutted or held not to arise.

In *Poole v. Schricte*[42] the court concluded that Mrs. Poole should prevail even if she were not innocent, but rather engaged in a meretricious relationship with Mr. Schricte. The court held that since the evidence established a joint venture in the tavern, if not a partnership, she was entitled to at least a one-half interest therein in as much as both parties participated in the acquisition of property in a business sense and not in a husband-wife sense. The *Creasman* presumption was overcome by this evidence of a joint venture:[43]

> Her [Mrs. Poole's] rights do not stem from cohabitation or the meretricious relationship, but from the fact that the proceeds from the beauty shop she operated clearly constituted a larger portion of the Crosley account [from which the purchase price of the tavern was taken] than did Mr. Schrichte's earnings as a railroad switchman.

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the other's acquisitions was afforded the innocent one but not vice versa. DEFUNIAK & VAUGHN § 56 at 97. For a provocative discussion of recent developments in the meretricious relationship generally, *see* 48 WASH. L. REV. 635 (1973).

40. 31 Wn. 2d 345, 196 P.2d 835 (1948).

41. *Id.* at 356, 196 P.2d at 841. The court concluded the couple intended Mrs. Paul to possess and own the property since title was taken in her name. Chief Justice Mallery, in dissent, argued that it was obvious from the record that the couple intended to enjoy and possess the property in common.

42. 39 Wn. 2d 558, 263 P.2d 1044 (1951).

43. *Id.* at 564, 263 P.2d at 1048–49.

The court further said that their "social relationships, legal, or illegal, moral or immoral, are not material."[44]

A few years later in *West v. Knowles,*[45] the court again found evidence rebutting the *Creasman* presumption when at trial the parties to the meretricious relationship traced to the sources of their acquisitions. The trial court ruled such tracing was sufficient to overcome the *Creasman* presumption. On appeal the court affirmed and said:[46]

> The Court was correct in tracing the property in the instant case, because both parties testified *in extenso* regarding their properties. None of the property ever lost its character as separate property, notwithstanding the commingling thereof, the resulting confusion, and the difficulty of separating it. *No presumptions arise as to property which can be traced to one or the other.* It belongs to the original owner in the absence of an overt gift or contract regarding it. Property acquired with contributions from both parties is held as tenants in common, and courts will presume they intended to share the property, in proportion to the amount contributed, where it can be traced, otherwise they share it equally.

In a special concurring opinion to *West v. Knowles,* Judge Finley urged that the division of property between parties to meretricious relationships should be governed not by abstract doctrines such as the *Creasman* presumption, but by the principle of a fair and equitable distribution:[47]

> A fair and equitable distribution of property does not imply an accounting operation with the precision and delicacy of a surgeon's scalpel. It merely connotes a reasonable and rough approximation and appraisal of earnings and other factors, and a division of property that will in a general way be reasonable, fair, and equitable by the standards of just, tolerant, and understanding individuals.

The difference between the *Creasman* approach and Judge Finley's approach was reflected eight years later in *Humphries v. Riveland.*[48] In *Humphries,* the surviving party of a 13-year meretricious relation-

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44. *Id.* at 565, 236 P.2d at 1049. *See also* Hynes v. Hynes, 28 Wn. 2d 660, 184 P.2d 68 (1947), in which title was placed in both names, pursuant to an agreement that both would own.
45. 50 Wn. 2d 311, 311 P.2d 689 (1957).
46. *Id.* at 313, 311 P.2d at 691 (emphasis added).
47. *Id.* at 321, 311 P.2d at 695 (Finley, J., concurring).
48. 67 Wn. 2d 376, 407 P.2d 967 (1965), *noted* in 41 WASH. L. REV. 578 (1966).

ship sought to establish a half interest in property acquired during the relationship. Denying recovery, the trial court ruled that the survivor had not overcome the *Creasman* presumption since she could not show a contractual arrangement between herself and the decedent or trace to any tangible asset, but could only trace to her labor. The trial judge concluded that her labor contributions had been gratuitous. The court affirmed in a five-to-four decision. Judge Finley dissented, again emphasizing that the only effect of the meretricious nature of a relationship should be to preclude application of community property law, not to foreclose attempts to arrive at a fair and reasonable division of property accumulated during the relationship.[49]

The *Creasman* presumption has had its primary force in controversies involving the survivor of the relationship, probably because, as the court noted in *Poole v. Schrichte*,[50] the dead man's statute[51] has impeded presentation of testimony to rebut the presumption. When both parties are alive at the time of the controversy, however, the *Creasman* presumption has been rebutted and the respective interests of the parties protected through proof of a resulting trust,[52] joint venture,[53] tenancy in common,[54] or individual ownership.[55] The control of the presumption thus has been frequently avoided, suggesting its eventual demise.

More direct doubts concerning the continued validity of the *Creasman* presumption were expressed in a recent case, *In re Estate of Thornton*.[56] *Thornton's Estate* involved active participation by Lucy Antoine, the survivor of a meretricious relationship, in the development of a cattle-raising and farming enterprise to which the dece-

49. *Id.* at 398, 407 P.2d at 979 (Finley, J., dissenting). Three other judges dissented stating that even if there should not be an equal division of the property in an ownership sense, the court should nevertheless recognize and protect the contribution the woman had made to the value of the property standing in the decedent's name.

50. 39 Wn. 2d at 562–63, 263 P.2d at 1048.

51. WASH. REV. CODE § 5.60.030 (1963). If the assets in controversy have been acquired through "business" activity, the possibility of showing the survivor's participation in that activity minimizes the likelihood that the dead man's statute will preclude establishing an ownership interest in the survivor.

52. Walberg v. Mattson, 38 Wn. 2d 808, 232 P.2d 827 (1951).

53. Poole v. Schrichte, 39 Wn. 2d 558, 236 P.2d 1044 (1951).

54. Iredell v. Iredell, 49 Wn. 2d 627, 305 P.2d 805 (1957); Hynes v. Hynes, 28 Wn. 2d 660, 184 P.2d 68 (1947).

55. West v. Knowles, 50 Wn. 2d 311, 311 P.2d 689 (1957).

56. 81 Wn. 2d 72, 499 P.2d 864 (1972), *noted* in 48 WASH. L. REV. 635 (1973). *See also* Comment, *The Meretricious Relationship in Washington: A Survivor's Interest in Common Property*, 9 WILLAMETTE L. J. 102 (1973).

dent Roy Thornton had held title. All the assets in the decedent's estate were traceable to the profits of the enterprise. The court held that upon this proof Ms. Antoine had made a prima facie case of an implied partnership, thus again avoiding the control of the *Creasman* presumption. The holding in *Thornton's Estate* is an application (or perhaps a slight extension) of the reasoning in *Poole v. Schrichte,* in which the court found a joint venture of the parties,[57] but forceful dictum in the case suggests the probability that the application of the *Creasman* presumption in the future will be greatly restricted.[58]

Judge Finley stated for the court that, in addition to an implied partnership, Ms. Antoine might assert "the existence of a relatively long-term, stable meretricious relationship in which the partners appear to hold themselves out as husband and wife,"[59] and, that from such a relationship in itself, might claim the right to a half-share in their accumulations similar to that of a legal wife. Judge Finley noted, however, that this argument would run afoul of the holding in the *Creasman* case. Judge Finley added:[60]

> We are dubious about the continuing validity of this legal presumption or fiction, accepted and applied in *Creasman v. Boyle.* We have disclaimed, and continue to disclaim, any opinion or intended reflection on the moral status of a couple living in a meretricious relationship . . . .

The court examined cases involving full testimony by the nontitled party to a meretricious relationship and noted that in each case the court had found the *Creasman* presumption rebutted by the evidence; hence, "[i]t would appear that the presumption is of questionable validity . . . ."[61] However, since the plaintiff's claim in *Thornton's Estate* was based on an implied partnership, the court stated:[62]

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57. Joint adventure–"a limited partnership,–not limited in the statutory sense as to the liability of the partners, but as to its scope and duration." BLACK'S LAW DICTIONARY 73 (4th ed. 1951). The contribution in *Thornton's Estate* appears to be labor, either only or primarily; in *Poole* there was direct monetary contribution as well as labor.

58. Five judges concurred in the opinion; the chief justice and two other judges concurred in the result.

59. 81 Wn. 2d at 75, 499 P.2d at 866. The court stated that Ms. Antoine might also base her claim upon a contract to make a will. *Id.*

60. 81 Wn. 2d at 77, 499 P.2d at 866.

61. 81 Wn. 2d at 78, 499 P.2d at 867. The court added that the presumption might be unconstitutional under the analysis of Leary v. United States, 395 U.S. 6 (1969).

62. 81 Wn. 2d at 78–79, 499 P.2d at 867.

> Therefore, in the absence of an appropriate record from the trial court and without the aid of argument on appeal, we do not decide whether the presumption of *Creasman* remains valid. Arguably, *Creasman* should be over-ruled and its archaic presumption invalidated.

C. *Meretricious and Innocent Relationships After Thornton's Estate*

After *Thornton's Estate* there may well be three types of property division resulting from innocent and meretricious relationships: (1) The innocent relationship where refined protection of the equities will be afforded; (2) the meretricious relationship *intended* to be a stable, continuing "family type" arrangement where the parties will qualify for a rough, equitable share in the other's acquisitions; and (3) the short term meretricious relationship *not intended* to be a stable, continuing relationship where the *Creasman* presumption will retain vitality.

Where the parties have engaged in a casual relationship, *e.g.*, where they meet on Thursday nights, lack of *intention* to establish a long-term meretricious relationship easily may be inferred. In these kinds of relationships, neither party can reasonably expect to share in the other's acquisitions, nor have the joint efforts of the parties contributed to the property accumulations of either, and thus it would simply be unfair for the court to divest the titled party of ownership. Hence, it is reasonable to assume that the court will continue to apply the *Creasman* presumption to the short term meretricious relationship.

Assuming the *Creasman* presumption will not be applied in future cases to the "family-type" meretricious relationship, as suggested in *Thornton's Estate,* on what basis will the nontitled party be able to assert a share in the other's acquisitions? The *Thornton's Estate* dictum that the existence of a relatively long-term, stable meretricious relationship in itself may support a claim in the other's acquisitions implies that where the parties *intend* that both contribute to the success of the common enterprise, they should share accordingly in the common acquisitions; the analogy to the joint contribution reasoning in community property acquisitions is patent. This joint contribution inference should also be permissible when it can be shown that the two *intended* a "long and stable relationship" which did not materialize by reason of the "early" death of one. In these situations, either direct (*e.g.*, monetary) contribution to a particular acquisition or indirect (e.g., labor in the home) contribution to acquisitions should result

in a division of property acquired during the relationship.

On this analysis, the results in both the *Creasman* and the *Walberg v. Mattson*[63] cases, for example, would be different. Chief Justice Mallery, dissenting in *Creasman,* thought the record clearly indicated the parties "*intended* to enjoy and possess the property in common",[64] and disagreed with the majority's conclusion that resulting trust principles should be applied. In the *Walberg* case, the man put title to a home in the woman's name; the court concluded that the man should retain the entire interest in the home on the reasoning that she held on a resulting trust for him. The dissent in *Walberg*[65] believed resulting trust principles had been misapplied, pointing out that the plaintiff had testified he bought the house as a home for them and her family.[66] The *Walberg* and *Creasman* factual situation would, under the suggested *Thornton's Estate* analysis, result in a division of the property because of the intention to establish a long and stable relationship.

The question remains, however, whether the court will distinguish between long and stable meretricious relationships and innocent relationships in the division of property. Application of more refined distinctions in equity for the innocent relationship is suggested by Judge Finley's concurring opinion in *West v. Knowles.*[67] However, the joint contribution reasoning inherent in the *Thornton's Estate* dictum, suggesting that the location of title will not be controlling as to the equities, and the court's continuing statements that the morality of the parties is not material[68] might mean that property will be divided between the parties in these meretricious relationships upon the same equitable reasoning applied to innocent relationships.[69]

III. CHARACTER OF OWNERSHIP OF PROPERTY

A. Statutory Scheme and Basic Presumptions

As noted previously in the introduction, the statutory scheme controlling the character of ownership of property acquired by either or

63. 38 Wn. 2d 808, 232 P.2d 827 (1951).
64. 31 Wn. 2d at 362, 196 P.2d at 843 (emphasis added).
65. Schwellenbach, C.J.
66. A probable "permanent" relationship was contemplated. He testified he "didn't want to shack around." 38 Wn. 2d at 810, 232 P.2d at 828.
67. 50 Wn. 2d at 315, 311 P.2d at 692, (Finley, J., concurring).
68. *See* note 44 *supra* and *Thornton's Estate,* 81 Wn. 2d at 77, 499 P.2d at 867.
69. If one party in the relationship is innocent, and the other is not, a refined distinction in the equities to protect the innocent party might be warranted.

both spouses has remained unchanged since territorial days. "Property and pecuniary rights" owned by either spouse at marriage, thereafter lucratively acquired, and the rents, issues and profits thereof constitute separate property of that spouse.[70] All assets otherwise acquired after marriage by either or both spouses are community property.[71] In ascertaining whether assets fall within the separate or community property section of the statutes, the Washington court frequently has emphasized the rule that the facts existing at the time of acquisition control: "the status of property . . . becomes fixed as of the date of its purchase or acquisition, and that status, when once fixed, retains its character until changed by agreement of the parties or operation of law."[72]

The fundamental premise of the community property system is that both spouses contribute to property acquisitions in a joint effort to promote the welfare of the relationship.[73] Hence, an asset onerously[74] acquired during marriage is presumptively community property whereas one lucratively[75] acquired ordinarily is not. The Washington court's preference for community property is clear, however, and this preference permeates the court's basic statutory analysis—property acquired by a spouse *is* community property unless the transaction falls within a separate property section.[76]

1. The basic presumption

In *Yesler v. Hochstettler,*[77] the Washington court stated the basic presumption that an asset acquired during marriage is presumed to be

70. WASH. REV. CODE §§ 26.16.010 & .020 (1963)

71. WASH. REV. CODE § 26.16.030 (Supp. 1973). The extensive changes in this section in 1972 affect management and disposition but not the character of ownership of community property.

72. *In re* Binge's Estate, 5 Wn. 2d 446, 484, 105 P.2d 689, 705 (1940). *In re* Madsen's Estate, 48 Wn. 2d 675, 296 P.2d 518 (1956).

73. Togliatti v. Robertson, 29 Wn. 2d 844, 852, 190 P.2d 575, 578 (1948).

74. Acquisition by labor or industry or other valuable consideration. DEFUNIAK & VAUGHN § 62.

75. Lucrative acquisition by gift, succession, inheritance or other nonvaluable means. *See* DEFUNIAK & VAUGHN § 62. Gift, inheritance, devise and bequest involve lucrative (donative) acquisitions which usually are not but may be community property. *Id.*

76. *See, e.g., In re* Slocum's Estate, 83 Wash. 158, 145 P. 204 (1915); *In re* Witte's Estate, 21 Wn. 2d 112, 150 P.2d 595 (1944); Stephens v. Nelson, 37 Wn. 2d 28, 221 P.2d 520 (1950).

77. 4 Wash. 349, 30 P. 398 (1892). In the *Yesler* case land was acquired by ordinary deeds expressing a valuable consideration. The court held that if proof against

community property and, if the transaction indicates a valuable consideration was paid, the presumption can be overcome only by clear and convincing proof that the transaction falls within the scope of a separate property section. If nothing indicates the circumstances of an acquisition during marriage or whether a valuable consideration was paid, the basic presumption may not be so strong, but practically speaking, at least a recited valuable consideration can be shown in most instances. Even if one cannot be shown, the *Yesler* proposition that the basic presumption can be weighed against and will control over doubtful proof that the transaction falls within the separate property section probably means that to prevail the separate property proponent's proof must be persuasive, not merely plausible.

Application of the basic presumption that assets acquired during marriage are community property assumes the existence of the marital relationship at the time of acquisition, and, if that assumption is challenged, the fact of marriage must be established.[78] Probably in most contested situations the relationship is shown by testimony or documentary evidence of marriage prior to the time of acquisition, but circumstantial evidence can be sufficient.[79] Of course, if the acquirer was unmarried, the character of the asset at the time of acquisition is necessarily separate.

A presumption that an asset *possessed* by a married person is community property may arise even though the particular time of acquisition has not been established.[80] This presumption may be a reflection of the commingling and tracing rules hereafter discussed which tend to induce the conclusion that an asset in dispute is community property. This presumption is unlikely to arise, or to have much strength, however, until the marital relationship has existed for a substantial period of time.[81]

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the presumptive community character left the matter in doubt, the presumption controlled. This principle was applied in Woodland Lumber Co. v. Link, 16 Wash. 72, 47 P. 222 (1896).

78. Chase v. Carney, 199 Wash. 99, 90 P.2d 286 (1939).

79. Proff v. Maley, 14 Wn. 2d 287, 128 P.2d 330 (1942).

80. State *ex rel.* Marshall v. Superior Court, 119 Wash. 631, 206 P. 362 (1922) (presumption of community property character of all assets possessed by married men supports finding they were insolvent as regards separate liability).

81. *See, e.g., In re* Jolly's Estate, 196 Cal. 547, 238 P. 353 (1925); Riddle v. Riddle, 62 S.W. 970 (Tex. Civ. App. 1901). The longer the marital relationship has continued the greater the likelihood that the time of acquisition was after marriage or that commingling has made a source asset community property.

2. Rebutting the basic presumption

The basic presumption of the community character of a postnuptial acquisition can be rebutted by evidence putting the acquisition transaction into a separate property section (*e.g.*, gift, bequest); it can also be rebutted by showing, through tracing, that the asset used to acquire the one in question was separate property. As the court has said, "[s]eparate property continues to be separate property through all of its changes and transitions so long as it can be clearly traced and identified. . . ."[82] Mere assertion that the acquisition was by use of separate funds does not overcome the basic presumption, however; rather, there must be clear tracing of the separate funds into the asset in controversy.[83] Placing the title in the name of one of the spouses neither controls nor has any particular significance in determining the character of ownership; therefore, it is of little use in rebutting the *Yesler* presumption.[84] If community funds are used to purchase property by the husband with title taken in the wife's name, he intending that she own separately, it may be necessary, and certainly it is safer, that he also execute a quit claim deed to her.[85]

Tracing to the character of the funds used to purchase the asset in question often is necessary to establish its character. If the acquisition funds were the earnings of a spouse, that normally would be the end of the search–the source asset would have been identified and since earnings of spouses while living together are community property, the

82. *In re* Witte's Estate, 21 Wn. 2d 112, 125, 150 P.2d 595, 601 (1944).

83. Berol v. Berol, 37 Wn. 2d 380, 223 P.2d 1055 (1950); Hamlin v. Merlino, 44 Wn. 2d 851, 272 P.2d 125 (1954). Nor does the husband's testimony of acquisition by gift rebut the presumption, when the deed recites valuable consideration. Abel v. Abel, 47 Wn. 2d 816, 289 P.2d 724 (1955).

84. Merrit v. Newkirk, 155 Wash. 517, 520, 285 P. 442, 444 (1930). The matter was neatly stated:

> Under our somewhat perplexing statutes relating to the acquisition of property, title to real property taken in the name of one of the spouses may be the separate property of the spouse taking the title, the separate property of the other spouse, or the community property of both of the spouses, owing to the source from which the fund is derived which is used in paying the purchase price of the property.

85. The court indicated the statute of frauds applied, in *In re* Parker's Estate, 115 Wash. 57, 196 P. 632 (1921). The author believes this is unsound because it jumps over the problem of the character of the acquisition. The use of the quitclaim deed is important to change or raise the presumption of change to separate ownership. *In re* Carmack's Estate, 133 Wash. 324, 233 P. 942 (1925).

acquired asset would be a community asset.[86] However, if the acquisition funds were acquired by sale of an asset, analysis of the ownership character of that asset would be necessary, and so on, until either a source in a spouse's earnings or within the separate property section is identified; only the latter source will rebut the basic presumption.

B. Acquisition by Gift

An acquisition by one spouse by gift, or otherwise within the separate property section, will apparently, but not necessarily, be separate property. The substance rather than the form of the transaction will control so that an acquisition which appears to be lucrative can be found to be onerous. Thus in *Andrews v. Andrews*[87] the court concluded that a devise to the husband, had it been made, would have been in performance of a contract to devise in return for services to the decedent, and thus an onerous acquisition of community property in which the wife would have an interest. The intention of the transferor is probably determinative of whether an acquisition which in form fits within the separate property section is in fact lucrative; if a donation is not intended, the acquisition falls within the language of the community property section,[88] even though it might be difficult to conclude the acquisition was "onerous."[89]

A special problem arises where a gift is not to one, but to both of the spouses. In substance the community property statutes establish permissible types of property ownership rather than solely specifying particular means by which community property may be acquired.[90]

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86. It is sometimes helpful to think of a spouse's productive or earning capacity as the basic community property asset; this approach would present a two-step—tracing to earnings, then to earning capacity—rather than a one-step tracing, but of course with the same result.

87. 116 Wash. 513, 199 P. 981 (1921).

88. WASH. REV. CODE § 26.16.030 (Supp. 1973).

89. *See In re* Gold's Estate, 170 Cal. 621, 151 P. 12 (1915); United States v. Elfer, 246 F.2d 941 (9th Cir. 1957). deFuniak & Vaughn criticize the sweeping inclusion within the community property section as a failure to recognize that the system contemplates onerous acquisition through industry, labor or talent of the spouse(s), DEFUNIAK & VAUGHN §§ 62, 76. The statutory language does support the inclusion: "Property not acquired . . . as prescribed in [the separate property sections] acquired after marriage by either [spouse or both] is community property." WASH. REV. CODE § 26.16.030 (Supp. 1973).

90. In Stockstill v. Bart, 47 F. 231 (C.C.W.D. Wash. 1891), the federal court concluded the Washington statutes had the latter effect. The Washington court rejected this view in *In re* Salvini's Estate, 65 Wn. 2d 442, 397 P.2d 811 (1964).

Thus, despite the language of the separate property sections, which could be interpreted to mean that a gift to both spouses necessarily creates a separate property ownership in each, the court in *In re Salvini's Estate*[91] held that such a gift creates community property in the donee spouses.

However, the sweep of the concluding statement in *Salvini's Estate* that "[a] gift to a husband and wife is a gift to the community under our statutes,"[92] needs clarification. This statement may announce a flat rule that when the donees are husband and wife the asset acquired is necessarily community property; but preferably the statement should be considered as the expression of a presumption which will control in the absence of proof of a different intention in the donor. The donor, if he so intends, should be permitted to create in his donees some recognized form of common law (separate property) co-ownership. Although in *Salvini's Estate* both spouses were named as grantees and were in fact identified as "husband and wife," the presumption of a gift to the community should arise even though the transfer instrument does not indicate the marital relationship of the donees. Avoiding a flat rule and permitting a presumption of community property character to arise would recognize "the policy of the law . . . in favor of community property,"[93] but still permit the intention of the parties to control.

Another gift transaction should be mentioned. When one spouse uses *separate* property to acquire an asset, title to which is taken in the name of the other spouse, there is under Washington law a rebuttable presumption of gift.[94]

C. *Acquisition While Living Separate and Apart: Marriages That are No Longer Accompanied by Community Relationships*

As previously discussed, the existence of the marital relationship is

91. 65 Wn. 2d 442, 397 P.2d 811 (1964). The Spanish law is the same. DEFUNIAK & VAUGHN § 69.

92. 65 Wn. 2d at 448, 397 P.2d at 814.

93. *In re* Salvini's Estate, 65 Wn. 2d at 448, 397 P.2d at 814, *quoting* Volz v. Zang, 113 Wash. 378, 383, 194 P. 409, 410 (1920).

94. Scott v. Currie, 7 Wn. 2d 301, 109 P.2d 526 (1941) (H bought with separate funds, took title in W's name; presumption not rebutted, she owned as her separate estate); Plath v. Mullins, 87 Wash. 403, 151 P. 811 (1915) (presumption of gift by wife not overcome); Denny v. Schwabacher, 54 Wash. 689, 104 P. 137 (1909) (presumption of gift by W found rebutted; H held under resulting trust for W).

prerequisite to a finding that an acquisition is community property, but even an onerous acquisition during the marital relationship, while ordinarily presumed to be community property, may be found to be the separate property of the acquirer by reason of the "living separate and apart" provisions of R.C.W. § 26.16.140.[95] Prior to the 1972 amendments, that section provided only that the wife's earnings and accumulations while living separate and apart were her separate property.[96] However, the case law had developed the requirement that a *community* relationship—as distinguished from merely a *marital* relationship[97]—exist between the husband and wife to establish his onerous acquisitions to be community property. The principal case enunciating this proposition is *Togliatti v. Robertson*[98] in which savings bonds acquired by the husband, after a long separation during which neither spouse relied on the efforts of the other, were found to be his separate property. The court's conclusion was reached on the dual bases that (1) neither spouse had contributed to the acquisitions of the other, contrary to the fundamental theory of community property, and that (2) a separate property agreement could be inferred from their conduct during the long and permanent separation.[99] The *Togliatti* rules apply only to a "defunct marriage" and not merely to a physical separation of the spouses, however, as the court explained in *Rustad v. Rustad,*[100] which held that acquisitions by the husband during the long separation of the spouses by reason of the wife's confinement in a mental institution outside of Washington were community property.[101]

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95. WASH. REV. CODE § 26.16.140 (Supp. 1973) states:
When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each. The earnings and accumulations of minor children shall be the separate property of the spouse who has their custody or, if no custody award has been made, then the separate property of the spouse with whom said children are living

96. Plus, of course, those of minor children living with her.

97. Existence of the marital relationship depends upon the legal requirements for marriage. Existence of the community relationship depends upon facts in addition to the marriage.

98. 29 Wn. 2d 844, 190 P.2d 575 (1948).

99. The first rationale was applied in *In re* Armstrong's Estate, 33 Wn. 2d 118, 204 P.2d 500 (1949); and the second in *In re* Janssen's Estate, 56 Wn. 2d 150, 351 P.2d 510 (1960).

100. 61 Wn. 2d 176, 377 P.2d 414 (1963). *See also* Schneider v. Biberger, 76 Wash. 504, 136 P. 701 (1913).

101. Mere physical separation similarly does not terminate the "family" relationship necessary to the three-way liability of the family expense statute, WASH. REV. CODE

Whether the inclusion of the husband in the 1972 amendments to R.C.W. § 26.16.140 is essentially a codification of the *Togliatti* rules or whether it effects a change from them to a different pattern previously limited to the wife's acquisitions is uncertain. Unquestionably both spouses should have identical positions not only by reason of the new phraseology of the section but also because of the thrust of the 1972 amendments for equality between them.[102] The problem, however, is to identify that position.

Nothing in earlier Washington cases establishes the content of the "living separate" language of the pre-1972 statute, but "living separate and apart" in the amended version obviously should have the same meaning. In *Kerr v. Cochran*[103] the defendant wife testified she was living separate and apart from her husband; the court said mere separation would not dissolve the community, and that:[104]

> [t]he statute merely states that the earnings of the wife are her separate property while she is living separate and apart from her husband. It has no effect on the status of property acquired prior to the separation, nor does it dissolve the marital community. The statute operates while the spouses are living separate and apart, and is effective regardless of whether there has been a dissolution of the *community*.

It is unclear whether the court in that case made the distinction between continued existence of a marital relationship and termination of a "community relationship" as we have used that term above.[105]

The preferable analysis of "living separate and apart" is that the statute contemplates a permanent separation, which may be estab-

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§ 26.16.205 (Supp. 1973). *See, e.g.*, Russell v. Graumann, 40 Wash. 667, 82 P. 998 (1905) (husband worked in Spokane for three years prior to his death there while wife continued to reside in Pennsylvania). *Contrast* Yates v. Dohring, 24 Wn. 2d 877, 168 P.2d 404 (1946).

102. *See* Cross, *1972 Amendments to the Washington Community Property Law*, 26 WASH. ST. B. NEWS 9 (April, 1972).

103. 65 Wn. 2d 211, 396 P.2d 642 (1964).

104. *Id.* at 225, 396 P.2d at 650 (emphasis added). This last sentence does indicate mere separation brings the statute into play even though there is not a "defunct marriage." Note, however, the proposition is not essential to the holding of no community liability. Similarly, the statement in Rustad v. Rustad that the spouses were living separate and apart (she being confined in an out-of-state mental hospital) does not compel a determination that mere physical separation, even though long continued, brings the statute into operation.

105. The holding in the case, however, is that the plaintiff in the tort action had failed to prove that defendant wife had incurred any community liability on any possible theory.

lished by factual patterns such as those existing in the *Togliatti* line of "defunct marriage" cases. Permanent separation, in essence, exists when *both* spouses no longer have the will to continue a "community relationship." A deserted spouse who desires that the relationship continue despite desertion or abandonment by the other—a frustration of the deserted spouse's community expectations—should remain protected by the community property rules and should be able to assert an interest in the deserting spouse's after-acquired property, but in no event should the deserting spouse be able to assert an interest in the deserted spouse's after-acquired property.[106] This approach accords with the Spanish rules.[107] There is also support for this approach both in the rule that the husband loses his managing power upon his abandonment of the wife,[108] and in the inference in *Hicks v. Hicks*[109] that the deserting husband's acquisitions subsequent to separation but prior to his divorce are community property to be divided between him and his former wife. When the deserted spouse accepts the futility of hope for restoration of a normal relationship, the marriage should be considered "defunct" or the separation permanent so that the statute applies.[110] Finding the statute applicable when the deserted spouse accepts, or perhaps just acquiesces, in the separation seems to be in philosophical harmony with the recently enacted Dissolution Act;[111] to dissolve a marriage the Act does not require affirmative concurrence in the other spouse's allegation that the marriage is "irretrievably broken," but only that the spouse does not deny the allegation. A decree of seprate maintenance likewise should invoke the statute.[112]

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106. This analysis is more fully explored in Cross, *Equality for Spouses in Washington Community Property Law–1972 Statutory Changes,* 48 WASH. L. REV. 527, 531–33 (1973).

107. DEFUNIAK & VAUGHN § 57. The problem not having been resolved in Washington, the Spanish law should be persuasive. *See In re* Salvini's Estate, 65 Wn. 2d 442, 397 P.2d 811 (1964). *See also* G. MCKAY, COMMUNITY PROPERTY § 299 (2d ed. 1925).

108. Wampler v. Beinert, 125 Wash. 494, 216 P. 855 (1923).

109. 69 Wash. 627, 125 P. 945 (1912).

110. This should be established by the deserting spouse and not be merely a matter of elapsed time. *Compare* Johnson v. Dept. of Labor & Industries, 3 Wn. 2d 257, 100 P.2d 382 (1940) (separation for two years without attempt to enforce support obligation is abandonment; wife abandoned for one year or less is ineligible for benefits under the workman's compensation statute).

111. WASH. REV. CODE § 26.09.030(1) (Supp. 1973).

112. This is so even though the limited purpose of the action for separate maintenance does not permit the decree to fix the character of property held or which may be acquired in the future. Cohn v. Cohn, 4 Wn. 2d 322, 103 P.2d 366 (1940).

D. Acquisitions from the Federal Government

If a particular asset is acquired from the federal government, federal law may intervene and control, by virtue of the Supremacy Clause of the Federal Constitution,[113] effecting a result contrary to that dictated by ordinary community property rules. If the source of the acquisition is community property funds or the labor of a spouse, the ordinary rule would establish the community character of the asset, and the dispositive and succession rights to the asset would be controlled by local law.

In the early federal homestead cases, federal law controlled with whom the federal government would deal,[114] but when a patent was issued the nature of the ownership of the land was determined by local law.[115] However, in *Wissner v. Wissner* the United States Supreme Court held that federal law controlled the effectiveness of the beneficiary designation of national service life insurance even though the result was contrary to state community property law.[116] In *In re Allen's Estate*[117] the Washington court held that ownership in United States savings bonds was determined by state community property law; the applicable federal regulations, in the Washington court's view, were a matter of administrative convenience only and did not control substantive rights in the bonds. The United States Supreme Court[118] subsequently rejected the position of the Washington court in *Allen's Estate* and held that federal law governs substantive rights of power of

113. U.S. CONST. art. VI, cl. 2.

114. G. MCKAY, COMMUNITY PROPERTY §§ 547–49, 555–57 (2d ed. 1925), explained the result on the basis of a federally created right of survivorship.

115. McCune v. Essig, 199 U.S. 382 (1905); Buchser v. Buchser, 231 U.S. 157 (1913). *See generally* Evans, *Community Property in Public Lands*, 9 CAL. L. REV. 267 (1921).

116. 338 U.S. 655 (1950). A particularly interesting reaction to this holding is Davis, *The Case of the Missing Community Property*, 5 Sw. L. J. 1 (1951).

117. 54 Wn. 2d 616, 343 P.2d 867 (1959).

118. The cases are Free v. Bland, 369 U.S. 663 (1962) (Texas law) and Yiatchos v. Yiatchos, 376 U.S. 306 (1964). The latter reversed the Washington court's holding, *In re* Yiatchos' Estate, 60 Wn. 2d 179, 373 P.2d 125 (1962), as to the husband's half interest and remanded for further clarification of the Washington law on the wife's interest in community property. The court concluded it was uncertain whether the wife's vested half interest in community property applied to all community property in the aggregate or inhered in each item. The item theory of community property ownership is reflected in the holdings discussed *infra* on transfers and availability to reach of creditors. There was no direct holding as regards death succession prior to *In re* Estate of Patton, 6 Wn. App. 464, 494 P.2d 238 (1972), in which the court of appeals concluded the item theory was applicable there also.

disposition of United States savings bonds. The Supreme Court's interference in *Yiatchos v. Yiatchos*[119] with local rules also reversed the state burden of proof in gift transactions by holding that to successfully attack the husband's disposition of the bonds the wife must show she had not concurred in his donative transfer. The local rule, on the other hand, puts the burden on the proponent of a "separate" property claim when the wife has not participated in the gift.[120]

E. Time of Acquisition: Mortgage, Life Insurance and Installment Acquisitions

The ownership character of an asset is determined "at the time of acquisition" and, except in the federal homestead cases, the previous discussion essentially assumes that the acquisition transaction was either instantaneous or that it posed no problems in identifying the time of acquisition. Unfortunately, in situations in which the full economic value of an asset is not acquired until payment of a series of installments, determination of the time of acquisition, and the resulting character of an asset, may be difficult. In two common patterns of acquisition the court has developed clear rules: acquisition of legal title by means of mortgage financing, and acquisition of a life insurance policy (or proceeds of one). The rules are not clear, however, for acquisition through payments on an installment contract where legal title is not obtained until the payments are completed.

1. Mortgages

In a mortgage financing situation, where the buyer acquires title at the outset in exchange for a cash payment and an obligation to pay the remainder of the purchase price, the fractional share of the ownership represented by the cash payment will be owned as the cash was owned,[121] and the character of the balance will be determined by the character of the credit pledged to secure the funds to pay the seller, or

119. 376 U.S. 306 (1964).

120. *See* Part IV, Management and Voluntary Disposition, *infra* for discussion of the transfer power.

121. Ownership of the cash is determined by application of the source doctrine, *i.e.*, by tracing to the original source.

to secure payment to him.[122] It does not matter that funds of a different character are subsequently used to pay the obligation;[123] the character of the asset is determined by the character of the cash and of the obligation at the time legal title and ownership is obtained. In three factual situations, however, difficulty arises in ascertaining as between husband and wife the character of the obligation.

If legal title is secured by partial payment without any personal obligation to pay the remainder of the purchase price, *e.g.*, taking title subject to a mortgage, the basic community or separate property presumptions will apply, clearly as to that fraction then paid for, but the effect of payment for the fraction represented by the unassumed mortgage debt with funds not having the same character as the presumption is unclear.[124]

If the security given for the obligation is the asset acquired and the credit's character is uncertain, it may be difficult to avoid a result based upon the basic community property presumption. In *Walker v. Fowler*[125] the court held the wife owned a quarter of the land in question separately because she had used her separate funds to pay that portion of the purchase price, but the balance was owned as community property because there was nothing to overcome a presumption that it was acquired by use of community credit.[126] If the asset acquired is income producing and in fact produces the funds to discharge the acquisition obligation, it is arguable that the character of

122. *See, e.g., In re* Dougherty's Estate, 27 Wn. 2d 11, 176 P.2d 335 (1947). *See* Part VI, Involuntary Disposition, *infra* for further discussion of the character of obligation question. There has long been a presumption that the husband's contract obligation is community in character. *See* Bryant v. Stetson & Post Mill Co., 13 Wash. 692, 43 P. 931 (1896); Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 P. 1058 (1892). Under the 1972 changes a similar presumption should apply to the wife's obligation. An obligation by assuming an existing mortgage should be similarly treated.

123. *In re* Finn's Estate, 106 Wash. 137, 179 P. 103 (1919).

124. *In re* Finn's Estate involved payment of the unassumed mortgage debt with community funds which, as the court said, supported the presumption of the community character of that share (Dawson tract). However, in Merkel v. Merkel, 39 Wn. 2d 102, 234 P. 2d 857 (1951), land conveyed to the husband prior to his marriage, subject to a mortgage, was held to be his separate property though the mortgage debt was discharged with community funds. The community interest was protected by an equitable lien but was not an ownership share. See text accompanying notes 212–46 *infra* for discussion of the equitable lien right.

125. 155 Wash. 631, 285 P. 649 (1930).

126. Even though part of the debt was subsequently paid by use of the wife's separate funds, the community creditor was able to reach the three-quarters community property ownership. Both spouses were bound on the note and mortgage. Note that under the 1972 changes the act of either spouse (or both) will be presumptively community in character.

the funds used to make the initial payment ought to control the character of the obligation and hence the ownership as between the spouses. There is some support for this argument in the proposition that similar funds, if available, are presumed to have been used to pay similar obligations, *e.g.*, separate funds pay separate obligations.[127]

As between the husband and wife, the controlling character of the obligation to pay the balance of the purchase price is not necessarily determined by the extent to which the creditor could enforce payment. The obligation may be separate primarily because one of the spouses provided his or her separate property as security even though it could be enforced against either spouse or the community property. For example, in *In re Finn's Estate,* [128] the wife's obligation, secured by a mortgage on other separate property of the wife, involved her separate credit and was the character-controlling obligation even though the husband (and thereby presumptively the community) was also bound by his signature on the note, the husband apparently signing at the insistence of the creditor.[129] As between the spouses a primary-secondary debtor's relationship may be established which is relevant to the determination of the character of the credit used in acquisition, without necessarily creating a principal-surety relationship affecting the creditor.

Since knowledgeable creditors are unlikely to accept a transaction which clearly creates only a separate liability, attempting to characterize a transaction by the recitals in the documents thus may be impractical, and the spouses may have to fix the transaction's character by independent, contemporary interspousal documents if the separate character as between them is to be unequivocally established.

2. *Life insurance policies*

The rules with reference to ownership of life insurance policies and their proceeds are clear and involve only tracing to determine the

127. *See, e.g.,* Guye v. Guye, 63 Wash. 340, 352, 115 P. 731, 735 (1911). The argument is obviously circular: the character of the credit is determined by the character of the security given which is determined by the character of the credit by which the asset (used as security) is acquired. This may mean that the presumption of community credit must prevail when there are no other available facts to consider.

128. *See* note 123 *supra* (Drew tract).

129. *See also* Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934), in which under similar borrowing conditions community liability was enforced by the creditor.

character of the funds used to pay the premiums. Ownership of the policy or its proceeds will be separate property or community property in proportion to the percentage of the total premiums which have been paid with separate or community funds.[130] Although an argument can be made that the source premiums, which lead to the apportionment or prorating of the ownership, ought to be considered with respect to the nature of the policy (*e.g.*, endowment, ordinary life, group-term, etc.),[131] the court has not done so and the process of apportionment of the ownership is the same for all policies.

The insurance, *i.e.*, the contract right reflected in the policy itself, is an asset, not a mere expectancy,[132] and is the immediate source of proceeds payable on death of the insured. If there is a partial or total community property ownership of the policy and the noninsured spouse dies, the decedent's community property interest is necessarily owned by the decedent's successors, with the consequent possibility of liability for the death succession tax.[133] Of course subsequent premium payments will reduce the "community" percentage of the ownership.[134] As an asset the policy needs to be taken into account in divorce-related property arrangements.[135]

3. *Installment contracts*

The rules are unclear in acquisitions of assets by performance of an installment purchase contract. Prior to the 1972 amendments, the

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130. Wilson v. Wilson, 35 Wn. 2d 364, 212 P.2d 1022 (1949); Small v. Bartyzel, 27 Wn. 2d 176, 177 P.2d 391 (1947).

131. *See* Small v. Bartyzel, 27 Wn. 2d at 185, 177 P.2d at 395 (Mallery, C.J., dissenting).

132. *In re* Coffey's Estate, 195 Wash. 379, 81 P.2d 283 (1938).

133. *In re* Leuthold's Estate, 52 Wn. 2d 299, 324 P.2d 1103 (1958). The value at death is held to be the cash surrender value. For federal tax purposes the value is the interpolated terminal reserve plus the unearned part of the last premium paid. Treas. Reg. § 20,2031–8 (1963). Absence of cash surrender value is irrelevant on the question of ownership and succession rights in the contract right reflected in the policy itself.

134. Scott v. Commissioner, 374 F.2d 154 (9th Cir., 1967).

135. *See, e.g.*, 31 WASH. L. REV. 146 (1956).

In the author's opinion, an undesirable application of the insurance rule was made in Chase v. Chase, 74 Wn. 2d 253, 444 P.2d 145 (1968), wherein, under the employer's multiple insurance protection plan, payment was made to the husband for a disability occurring after permanent separation and commencement of divorce but before the decree; the court held that the insurance was undisposed of community property and therefore equally owned by the former spouses. Such protection is pe-

problems were the same for real property and personal property acquisitions. There are now additional problems in real property purchases which will be discussed later.

The basic rule, that the ownership will be determined at the time of acquisition, is reiterated in this type of case, but the difficulty is in fixing the time of acquisition. There are two possibilities as to time of acquisition: (a) when the contract obligation arises (the mortgage rule), or (b) partial acquisition as each payment is made with final shares determined by an apportionment (the life insurance rule).[136] If funds of the same character are used to make all payments, the ownership of the asset will, by ordinary tracing rules, be the same as that of the acquiring funds.[137] Problems arise, however, when funds of a different character are used for part of the payments. Funds of a different character might be used even though the whole acquisition

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culiarly designed to meet future needs, is essentially "instantaneously" available by reason of current employment and not acquired over a time span. It should be "divided" if at all on an alimony analysis.

136. A third possibilty would be to determine ownership when legal title is transferred in performance of the seller's obligation. Under this possibility the ownership character would be controlled by the marital status at the time legal title is acquired. This result is wholly unsatisfactory and totally ignores the source doctrine, but remains as a slight possibilty because of the holding in *In re* Kuhn's Estate, 132 Wash. 678, 233 P. 293 (1925), that land conveyed to a widower was his separate property even though the contract to buy had been made while he was married. The result was that his children by his deceased wife had no ownership share despite payment of a quarter of the price with community funds. The children were protected by a right to reimbursement in the amount of one half of the payment made with community funds. The particular result followed from a strange proposition then extant in the Washington cases that the purchaser of land under an executory, forfeitable contract had no title or interest, legal or equitable. Obviously if nothing had been acquired by the time of the mother's death there was nothing for her children to inherit; but as later recognized in Norman v. Levenhagen, 142 Wash. 372, 253 P. 113 (1927), a contract right had been acquired and was property, the community or separate character of which would be determined by the usual rules. *See, e.g.,* Farrow v. Ostrom, 16 Wn. 2d 547, 133 P.2d 974 (1943), and Meltzer v. Wendell-West, 7 Wn. App. 90, 497 P.2d 1348 (1972). When the contract purchaser's right has been involved the court has held it to be community property when acquired during marriage, *i.e.,* the contract obligation to buy has been created by the purchaser's signing the contract, even though some separate funds were used in part payment. Farrow v. Ostrom, *supra.* Similarly, the court held land deeded to the husband after separation but before divorce was entirely community property even though he had completed the purchase by payment of the balance of the contract price after the separation with his separate funds. Half of his excess (separate property) contributions were charged as a lien against her half. Fritch v. Fritch, 53 Wn. 2d 496, 335 P.2d 43 (1959).

The author knows of no case in which the contract was made prior to marriage and final payments were made after marriage with community funds.

137. There is a presumption that, if both separate and community funds are available, payment of an obligation was made from the proper fund, Guye v. Guye, 63 Wash. 340, 115 P. 731 (1911); *In re* Finn's Estate, 106 Wash. 137, 179 P. 103 (1919).

process occurs during marriage,[138] but they are more likely to be used when the process overlaps the time of marriage or dissolution of the marital relationship by death or divorce, so that necessarily some payments have been made with separate property funds.

McKay insisted that an asset conveyed after marriage in fulfillment of an antenuptial contract was necessarily separate property.[139] Application of the source doctrine (tracing to the obligation incurred in the antenuptial transaction) also would establish, as in the mortgage cases, the separate character of the legal title ultimately acquired in fulfillment of an antenuptial contract. This approach was nicely stated in *In re Binge's Estate:*[140]

> Property acquired through contractual obligation, as between husband and wife and all others claiming under them, has its origin and is acquired as of the date when the obligation becomes binding, and not as of the time when the money is paid or the thing is delivered or conveyed. The fruit of the obligation is legally acquired as of the date when the obligation becomes binding.

This statement would appear to have settled the matter in favor of the mortgage rule, except that the court on the following page of the case stated that if the payments after marriage had been from community funds,[141] "to the extent of [payment from separate funds] the tract would be separate property of the husband, and the balance [paid with community funds] would represent the interest of the community in that section of land."[142] This, of course, is the life insurance rule. The "interest of the community" might refer to the right of reimbursement (equitable lien), but it appears to refer to a share of ownership.

The above statement quoted from *Binge's Estate* supporting the

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138. Although the likelihood may be small because of the basic presumptions of community character of the acts, and the possibility or even probability that commingling will have eliminated the potential separate property character of some funds used. *See, e.g.,* Pollock v. Pollock, 7 Wn. App. 394, 499 P.2d 231 (1972).

139. G. McKay, Community Property ch. 31 (2d ed. 1925), criticizing the contrary holding in *In re* Kuhn's Estate, 132 Wash. 678, 233 P. 293 (1925), and citing two federal homestead cases in support, Forker v. Henry, 21 Wash. 235, 57 P. 811 (1899), and Rogers v. Minneapolis Threshing Machine Co., 48 Wash. 19, 92 P. 774 (1907).

140. 5 Wn. 2d 446, 484, 105 P.2d 689, 705 (1940).

141. They were found to have been made with separate funds of the purchaser-husband.

142. 5 Wn. 2d at 485, 105 P.2d at 706.

mortgage rule was quoted by the court in *In re Dougherty's Estate*.[143] There, however, without any explanation, the court then concluded that certain personal property was owned as separate and community property proportionately to the antenuptial payments by the purchaser-wife and the postnuptial payments with community funds. Thus, the Washington court appears to be stating the mortgage rule, but applying the life insurance rule. There has not been any identifiable, different rule to be applied to real property acquisitions than is applied to personal property acquisitions.[144]

The confusion from the statement of the mortgage rule in *Binge's Estate* and the application of the life insurance rule in *Dougherty's Estate* might be resolved by the conclusion reached in a subsequent case, *Fritch v. Fritch*.[145] There, the land was held to have been community property undisposed of by the divorce decree and therefore held by the former spouses as equal tenants in common. The contract to buy was made while the spouses were married but final payments were made by the husband from his separate funds.[146] While title was conveyed before the divorce, the status of the spouses had fallen into the "defunct marriage" situation within the *Togliatti* rule,[147] although no point is made in *Fritch* of that situation. The reasoning and result in *Fritch* should be applicable, by analogy, to fulfillment payments made with separate funds by a former spouse after divorce (or death of the other). Given this reasoning, *Fritch* is contrary to *In re Kuhn's Estate*[148] and is an application of the mortgage rule quoted above from *Binge's Estate*. The variant result in *Dougherty's Estate* can be rationalized on the basis of an agreement between the spouses that a proportionate share of the ownership should be community property.[149] Application of the rule stated in *Binge's Estate* would give

143. 27 Wn. 2d 11, 176 P.2d 335 (1947).

144. The new 1972 rule pertaining to real property purchase, discussed *infra*, does not affect this problem.

145. 53 Wn. 2d 496, 335 P.2d 43 (1959).

146. As regards ownership of an asset acquired through installment contract payments, the sequence of successive payments by separate and community funds should be unimportant.

147. Togliatti v. Robertson, 29 Wn. 2d 844, 190 P.2d 575 (1948), discussed in text accompanying notes 98–102 *supra*.

148. 132 Wash. 678, 233 P. 293 (1925).

149. The possibility of fixing the character of ownership by agreement is recognized by the *Dougherty* court, 27 Wn. 2d at 19, 22–24, 176 P.2d at 339, 341–42. *See also* Part V, Transactions and Agreements Between Spouses, *infra*; DEFUNIAK & VAUGHN § 64.

the same significance to the initial obligation and payment whether the sequence was separate-community or vice versa; only the character of the initial obligation and not the character of subsequent payments is significant.[150]

The author thus believes it is desirable that there be clear adoption of the mortgage rule in installment acquisitions: the ownership character of an asset acquired in performance of a contractual purchase obligation should be the same as the character of the initial obligation. This rule has the attractiveness of certainty and would permit similar resolution of ownership questions in credit acquisitions, rather than variations based on the particular sort of credit transactions involved. When a different result, *i.e.,* an apportionment of ownership, is desired by the spouses, present rules permit them to change the character by agreement.[151] No more flexibility is needed even though there may be a rationale for automatic apportionment in some situations.[152] If necessary, payments from funds not owned by the original obligor(s) can be adequately protected through the "equitable lien" approach.[153]

Total consistency would require that other acquisitions by installment payments be owned according to the character of the initial payment or obligation, a rule which would require that a life insurance policy acquired before marriage be separate property even though later premiums had been paid with community funds.[154] Obviously, the Washington life insurance rule to the contrary is too well established to expect a change merely for the sake of consistency; besides, the author believes a change is not necessary because there is a rationale supporting different treatment of the life insurance asset. The court in *Binge's Estate* stated "the fruit of the *obligation* is legally acquired as of the date when the *obligation becomes binding.*"[155] Acquisitions through mortgage-type arrangements or installment

150. Adoption of this rule would uphold the principle that "the right of the spouses in their separate property is as sacred as is the right in their community property."

151. *See* Part V, Transactions and Agreements Between Spouses, *infra,* for further discussion of inter-spousal agreements.

152. *See* the suggested rationale in 35 WASH. L. REV. 286 (1960).

153. *See* section III-I *infra.*

154. This is apparently the rule, for example, in Texas where there is a community right to be reimbursed for the premiums so paid. *See* DEFUNIAK & VAUGHN § 64.

155. 5 Wn. 2d at 484, 105 P.2d at 705 (emphasis added).

purchase contracts involve *obligations* which can be enforced, perhaps even specifically enforced, by the obligee; whereas in the life insurance situation the insurer cannot compel the insured to pay premiums.[156]

A workable rule, then, is that an asset acquired through a transaction *requiring* the payment of installments over a period of time has the ownership character of the initial obligation and the "time of acquisition" is when the initial obligation is incurred, regardless of when title actually passed. By ascertaining the character of ownership on the basis of the character of the initial obligation, this rule would put the risk of subsequent fluctuation in value on the original obligor(s) who, presumably, contemplated that risk. In contrast, an asset preserved by or having its source in periodic payments which cannot be compelled (directly or indirectly) by the payee is owned in separate and community proportions according to the character of the funds used to make the "voluntary" payments.[157] Such a rule will also accommodate the problems appearing in connection with an asset of increasing importance–pension and retirement income rights.[158]

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156. This distinction was previously suggested by the author, noting that the cases do not purport to make it the rationale for the different results. Cross, *The Community Property Law in Washington,* 15 LA. L. REV. 640, 651–52 (1955).

157. Another situation of possible mixed-separate community ownership can be resolved by this approach: An encumbered asset or a contract purchaser's interest is devised to one spouse. The devisee is not obligated to pay, remove the encumbrance or pay out the contract, nor is the testator's estate. WASH. REV. CODE § 11.12.070 (Supp. 1973); *In re* McNulta's Estate, 168 Wash. 397, 12 P.2d 389 (1932); *In re* Cloniger's Estate, 8 Wn.2d 348, 112 P.2d 139 (1941). The suggested rule would apportion the ownership between the separate estate (by devise, WASH. REV. CODE §§ 26.16.010 & .020 (1963)) in the fraction of the then net equity and the estate from which the subsequent payments were made. If the devised asset produced the income to pay out, the whole should be separate property, but to the extent that the community estate of the devisee and spouse paid there should be a community property ownership share.

158. Such a rule will not accommodate the federal homestead cases in which an entryman was not required to complete the performance, and the antenuptial entry ripening into legal title (ownership) during marriage created separate property, and entry during marriage with title acquired by final proof after marriage also created separate property. The rules are stated in Teynor v. Heible, 74 Wash. 222, 133 P. 1 (1913). The latter situation is explicable on the basis of supremacy of federal law dictating who could acquire, thereby creating a special federal succession to the whole right. McCune v. Essig, 199 U.S. 382 (1905); *see* G. MCKAY, COMMUNITY PROPERTY §§ 547–49, 555–57 (2d ed. 1925).

A title, defective for some reason, but cured by adverse possession, can fit within such a rule on the analysis of relation back making the time of acquisition of the defective title the relevant time. It will not accommodate a title based only on adverse possession if that title is flatly concluded to be acquired when the statute of

4. Pension and retirement plans

Analysis of the character of pension and retirement income rights is complicated by the wide variation in retirement income programs, concepts of "vesting" which affect the time of "acquisition" of rights, mixed separate and community labor sources, and valuation questions.[159]

If it is not certain that the employed person will have a right to retirement income, it is possible to label his relationship to the retirement program as a mere expectancy to which community property concepts cannot be applied. It seems preferrable to the author to reject an expectancy analysis and to determine the community or separate character of the anticipated retirement income on the basis of community property rules, recognizing however that there may be difficult problems of valuation which necessarily must affect the solution of any ownership question that may arise. The Washington court likewise has concluded that an employee possesses a vested right and not a mere expectancy in such programs, regardless of their form.[160]

Divorce (dissolution) is a common arena in which such complications surface. If division of the present value of the "asset" is the only method by which to eliminate the complications, the valuation difficulty may be insurmountable, or at least undesirable, because of the uncertainty as to whether and how much income finally will be received. If the economic consequences of a long relationship with a retirement program can be reflected in a contingent award of alimony,

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limitations has run. Ownership of such a title could be apportioned; if it is not, the result should be treated as exceptional. *See also* DEFUNIAK & VAUGHN § 65 and MCKAY, *supra* note 79, §§ 585–99.

159. Helpful articles are Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future,* 44 TEX. L. REV. 860 (1966); Kent, *Pension Funds and Problems under California Community Property Laws,* 2 STAN. L. REV. 447 (1950); Comment, 37 S. CAL. L. REV. 594 (1964).

160. DeRevere v. DeRevere, 5 Wn. App. 741, 743, 491 P.2d 249, 251 (1971). The Washington court has concluded that there is a vested right and not a mere expectancy (emphasis in original):

> . . . it is now firmly established in this jurisdiction that retirement provisions are in the nature of deferred compensation; and, as such, the employee has a *vested right in the system* which cannot be altered to his detriment, whether such system be a public plan, *Bakenhus v. Seattle,* 48 Wn.2d 695, 296 P.2d 536 (1956); a private, employee contributory plan negotiated through the collective bargaining process, *Dorward v. ILWU-PMA Pension Plan,* 75 Wn.2d 478, 452 P.2d 258 (1969); or a voluntary, noncontributory (employer financed) plan, *Jacoby v. Grays Harbor Chair & Mfg. Co.,* 77 Wn.2d 911, 468 P.2d 666 (1970).

much of this valuation difficulty can be eliminated.[161] Adjusting alimony to reflect the amount of retirement income being received may also ameliorate valuation difficulties.[162]

The separate or community character of retirement income and of the inchoate right to future retirement income is affected not only by the non-marital or marital quality of the labor by which it is secured, but also by domicile in a common-law or community property law state while the labor was performed. However, the ownership of deferred compensation ought to be the same as it would have been had it not been deferred, *e.g.*, income and associated deferred compensation earned in a common law state should be the separate property of the acquiring spouse. If there is a time element involved including unmarried and married periods in either fixing the amount of the retirement income or qualifying to receive the income, the ownership of the income should be apportioned in accordance with the "insurance" rule.[163]

When the employed spouse dies, the valuation problems are usually resolved and the funds can be apportioned according to the above rules. Upon the death of the non-employed spouse, however, problems of succession[164] and valuation, complicated by the uncertainty of receipt of future income and the length of time of such receipt, will arise.[165]

The federal supremacy doctrine might complicate these problems even further if the retirement income is based on federal employment.[166] Military pensions are affected by provisions of the federal

161. *See* Hughes, *supra* note 159, 44 TEX. L. REV. at 881.
162. Edwards v. Edwards, 74 Wn. 2d 286, 444 P.2d 703 (1968).
163. The analogy is applied in DeRevere v. DeRevere, 5 Wn. App. 741, 491 P.2d 249 (1971).
164. These might be controlled by the contractual provisions of the system.
165. Consider *In re* Leuthold's Estate, 52 Wn. 2d 299, 324 P.2d 1103 (1958), involving a life insurance policy upon the death of the noninsured spouse.
166. *See* Note, *Military Retirement Benefits as Community Property–Busby v. Busby* [457 S.W.2d 551 (Tex. 1970)], 25 SW. L.J. 340 (1971). The argument has been made that a federal characterization should be made as in Wissner v. Wissner, 338 U.S. 655 (1950); Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 CAL. B. J. 12 (1973). The possibility was not treated as determinative in House v. House (Cal. Ct. App., 4th Dist., June 13, 1972) and Dominey v. Dominey, 481 S.W. 2d 473 (Tex. Civ. App. 1972). The United States Supreme Court refused to review the state court decisions. 409 U.S. 1118 (1973); 409 U.S. 1028 (1972).

statutes, and thus the Washington court of appeals in two cases concluded that they cannot be divided as property, because of federal characterization as nonvested property rights, but should be taken into consideration in fixing the amount of alimony.[167] The Washington Supreme Court reversed, however, characterizing military pension income as property to be divided and not as a basis to adjust alimony.[168]

F. Acquisition of Real Property

The 1972 amendments added a new paragraph to the basic community property statute changing the rules for *acquisition* of real property.[169] Previously the husband as manager acting alone could contract to buy community real property, even though the wife might disagree,[170] but joinder by both husband and wife was required to transfer or encumber community real property.[171] The 1972 amendments now require the joinder of both husband and wife to *buy* as well as to *sell* community real property. One problem which arises from the amendments is whether some sort of participation by the other spouse in a purchase transaction short of actual signing will constitute "joining" sufficient to establish the community character of the asset acquired. Such participation has been the rule in the transfer and encumbrance cases under comparably proscriptive language,[172] and the author believes that the analysis developed in these situations for transfers should be used in interpreting the new restrictive language for purchases. The statute does not preclude acquisition by either spouse of separate real property; hence a problem of practical importance to the seller will be whether a contract with only one spouse will be treated as a community property acquisition by the buyer with corresponding community liability, or rather as a separate

167. Roach v. Roach, 72 Wn. 2d 144, 432 P.2d 579 (1967); Payne v. Payne, 7 Wn. App. 338, 498 P.2d 882 (1972).

168. Payne v. Payne, 82 Wn. 2d 574, 512 P.2d 726 (1973).

169. WASH. REV. CODE § 26.16.030(4) (Supp. 1973): "Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase."

170. Baker v. Murrey, 78 Wash. 241, 138 P. 890 (1914).

171. WASH. REV. CODE § 26.16.040 (1963).

172. *See* discussion in Part IV, Management and Voluntary Disposition, *infra*. The new language of the statute on transfer should not change the analysis. WASH. REV. CODE § 26.16.030(3) (Supp. 1973).

property acquisition with separate liability. The possibilities and suggestions for solution have been explored previously.[173]

G. *Tracing and Commingling*

The basic presumption that an asset acquired during marriage is community property can be overcome through use of the source doctrine, that is, by tracing to a separate property origin or source.[174] Sometimes the process is reversed chronologically and the attempt is to show that an admittedly separate property asset has maintained its separate character despite mutations and is the source of the present asset.[175] If the links of the chain back to, or forward from, a separate property source can be clearly established, there will be separate property ownership of the disputed asset. However, if the character of one of the links is confused or uncertain, the basic community property presumption, in the form of the commingling doctrine or rule, breaks the chain. When this break occurs the uncertain link will be found to be community in character and to be the origin or source with respect to any subsequent change in form: "[w]here separate funds have been so commingled with community funds that it is no longer possible to distinguish or apportion them, all of the commingled fund, or the property acquired thereby, is community property."[176] As this author has previously stated, the commingling doctrine is simply another form of the basic presumption that an asset on hand during marriage

173. Cross, *Equality for Spouses in Washington Community Property Law–1972 Statutory Changes*, 48 WASH. L. REV. 527, 534–37 (1973).

174. It has previously been pointed out that the proof (*i.e.*, the tracing) must be clear and convincing. *See, e.g.*, Yesler v. Hochstetetter, 4 Wash. 349, 30 P. 398 (1892). The burden of proof rests upon the proponent of the separate property claim. *See, e.g., In re* Witte's Estate, 21 Wn. 2d 112, 125, 150 P.2d 595, 601 (1944).

175. The burden is on the proponent, similarly, to prove by clear and satisfactory evidence that the separate property asset in its changes in form has become the disputed asset (or is its product under the rents, issues and profits category). *See In re* Witte's Estate, 21 Wn. 2d 112, 150 P.2d 595 (1944).

The separate property source may be from individual ownership in a noncommunity property state, Brookman v. Durkee, 46 Wash. 578, 90 P. (1907).

176. *In re* Witte's Estate, 21 Wn. 2d 112, 125, 150 P.2d 595, 601 (1944). However, if the community property contribution can be shown to be inconsiderable as compared with the separate property contribution, the "commingling" will not make the whole community property.

Undoubtedly the doubts as to proportions of contributions would be resolved against the separate claim, in accordance with the preference given community property by the basic presumptions.

is community property; tracing is simply a method of asserting the clear evidence required to overcome the community presumption.[177]

1. Community labor on separate assets

The commingling doctrine is applicable if income is comprised of both community property and separate property ingredients. Such a pattern frequently occurs when separate property is managed by a spouse to produce income. The fruits of a spouse's personal efforts are community property,[178] but, by statute,[179] rents, issues and profits of separate property are separate property. Thus, if a spouse produces income by working with a separate asset, the resulting income will be partly community and partly separate unless the asset can be established to be sterile, *i.e.*, nonproductive.

If the income is not consumed and is allowed merely to accumulate, the size of the respective separate and community parts in the accumulation could be identified and determined by some formula, such as the relationship of interest return on the given separate investment to reasonable pay for the stated amount of community labor.[180] Such a formula should allow the possibility of proving that the income from the separate asset or the community labor had in fact produced a larger share than the formula would indicate. Periodic accounting, such as for income tax purposes, must focus on this sort of approach.

However, the more common problem between the spouses (or their successors) is likely to be determining respective shares in an accumulation of income remaining after current consumption or use of part of the income. Ordinarily the inquiry must consist of two steps: (1) determination of what part of the current income is fairly to be allocated to the separate and to the community "accounts" and (2) determination of how much and from which account the current income has been expended, permitting the remaining balances of the separate and community property accounts to be established. The second step usually will not be solved by application of any formula, but there are

177. Cross, *supra* note 156, 15 LA. L. REV. at 652–56.

178. As suggested in note 86 *supra*, the income-producing capacity of a spouse is, in effect, community property.

179. WASH. REV. CODE §§ 26.16.010, .020 (1963).

180. Possible formulas or approaches are identified and discussed in King, *The Challenge of Apportionment*, 37 WASH. L. REV. 483 (1962).

rules which assist in making the determination. A particularly important rule is that if funds of both kinds are available, the appropriate fund will be presumed to have been used to discharge an obligation or to pay an expense,[181] *i.e.,* separate funds to discharge separate obligations and community funds to discharge community obligations. The normal running expenses of the marriage (including family expenses) are to be charged principally to community property income. Thus it can easily develop that all of the community income has been currently consumed so that the accumulation can be identified as entirely separate.[182] If the purposes for which income expenditures were made can be identified, and the extent of consumption of income for community and separate purposes thereby established, it should be possible to determine the character of the remaining unexpended income.

It is probable, however, that the use made of withdrawn and consumed income cannot be determined in the absence of some adequate record keeping or initial separation of the income into its component parts.[183] This probability was stated by the court in *Hamlin v. Merlino:*[184]

> . . . it is clear that, where the separate property in question is *real estate or an unincorporated business* with which personal services ostensibly belonging to the community have been combined, the rule is that all the income or increase will be considered as community property *in the absence of a contemporaneous segregation of the income between the community and the separate estates. Salisbury v. Meeker,* 152 Wash. 146, 277 Pac. 276; *In re Witte's Estate* 21 Wn. 2d 112, 150 P.2d 595.

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181. *See, e.g.,* cases cited in note 137 *supra; In re* Estate of Kruse, 52 Wn. 2d 342, 324 P.2d 1088 (1958).

182. Concluded in Hamlin v. Merlino, 44 Wn. 2d 851, 272 P.2d 125 (1954); erroneously found in Pollock v. Pollock, 7 Wn. App. 394, 499 P.2d 231 (1972). *See also* State *ex rel* Van Moss v. Sailors, 180 Wash. 269, 39 P.2d 397 (1934). Such exhaustion of community property might cause near disaster in a death succession situation; in dissolution the power to allocate separate property minimizes the danger of "disaster" for the nonowning spouse.

183. Factually this is the circumstance, for instance, in Pollock v. Pollock, 7 Wn. App. 394, 499 P.2d 231 (1972), in which the court stated the "rule" requiring contemporaneous segregation (quoted *supra* in the text), then concluded there had been no adequate tracing to separate sources and added, "Furthermore, because of 'the absence of a contemporaneous segregation of the income' . . . [the particular assets must be deemed to have been acquired with community income]." *Id.* at 402, 499 P.2d at 237.

184. 44 Wn. 2d 851, 858–59, 272 P.2d 125, 129 (1954).

> On the other hand, where, as in the instant case, the husband at the time of marriage owned all or substantially all of the *stock of a corporation* somewhat different principles are applicable. In such cases, where a salary is paid to the husband by the corporation, it is reasoned that the community is thereby compensated for his services, and that any dividends paid or any enhanced value of the stock resulting from profits reinvested in the corporation are separate property.

The court in *Hamlin* thus suggests that contemporaneous segregation is a *sine qua non* to avoid commingling. However, contemporaneous segregation of community and separate income should not be required to avoid a conclusion that all of the income is community property because of commingling. As an observation of what happened in previous cases this rule is generally accurate and as a prediction of a result it is likely to be highly reliable, but contemporaneous segregation should not be required! To do so, it seems to the author, unreasonably and unnecessarily deprives the separate owner of property; community property is adequately protected by the difficulty of overcoming the basic presumption.

Furthermore, in the two cases cited by the court in the above quotation from *Hamlin v. Merlino,* commingling resulted from an inability to segregate; thus the *Hamlin* court was not compelled by precedent to adopt a rule requiring contemporaneous segregation. In *Salisbury,* an antenuptial tort liability was sought to be enforced against funds paid to the tortfeasor husband for work performed during the marriage. The husband at marriage had assets used in his roofing business, consisting of shovels, brooms, wheelbarrows, office furniture, etc., valued at $500. The business itself, as the court said, did not have the potential power to produce rents, issues or profit and thus essentially all income was the result of the personal efforts of the spouses. Even if it were conceded that part of the money was the earnings of his established separate business, the court continued, the funds were beyond the reach of the separate creditor because there was no way to segregate the earnings of his separate business from the earnings of his community labor. The *Salisbury* court relied on *In re Buchanan's Estate*[185] in which the original investment of separate funds was small and a large increase in value of the property

185. 89 Wash. 172, 154 P. 129 (1916).

was due principally to personal efforts of the husband; the whole was held to be community property, even though the asset was in fact shares in a corporation largely run by the husband as if it had been a partnership enterprise.[186] In the other case referred to in the quotation from *Hamlin v. Merlino* above, *Witte's Estate,* the court concluded that the attempt to trace farm income to "rents" (the landlord's share) rather than labor (the tenant's share) did not meet the required standard of a clear showing of the separate "rents" share; therefore, all of the accumulation had to be community property by reason of the commingling–not because of the absence of a contemporaneous segregation:[187]

> . . . since it is now impossible [not *impermissible*] to disentangle, separate, or apportion the component parts of the mass and thereby designate how much is separate property and how much is community property, it must all . . . now be considered as community property.

The necessity for a contemporaneous segregation of separate and community income has been reiterated in two subsequent cases, *In re Smith's Estate*[188] and *Pollock v. Pollock*.[189] However in both cases the holding turned on the conclusion that the commingling of funds was so complete that there was no possibility of apportionment to the respective sources. In the *Pollock* case the facts also indicate that business and personal expenditures, including household expenditures, were rather indiscriminately made from the particular accounts.

2. *Commingling of separate assets with community assets*

Commingling can, of course, totally submerge the separate property income ingredient of the commingled mass of separate and community income not only in situations involving a spouse's operation of a separately owned business but also in the ordinary management of

186. Further, the determination (in *Salisbury*) that commingled funds in a bank account are community property was supported by quotation from Jacobs v. Hoitt, 119 Wash. 283, 205 P. 414 (1922), in which, however, the principal holding is that an unincorporated bakery business established before marriage was owned in fractions, 8/14 separate and 6/14 community, even though there had been no direct, contemporaneous segregation whatever of the income from operation of the business.
187. 21 Wn. 2d at 128, 150 P.2d at 602.
188. 73 Wn. 2d 629, 440 P.2d 179 (1968).
189. 7 Wn. App. 394, 499 P.2d 231 (1972).

separate assets.[190] Further, it is possible that the separate property asset itself, as distinguished from its income, can be submerged by commingling.[191] Such a result has been reached even where the commingled separate assets were shares in a corporation,[192] though this result would be unlikely if at least minimal corporate records were kept.[193] The usual problem, however, involves commingling of income rather than the asset, and although the whole of the incremental increase in value and all income from the separate asset may be found to be community as a result of the commingling, the original value or amount of separate property may still exist in the unsegregated total.[194] But separate property will not continue to exist if during the commingling process all value of separate property is dissipated.[195]

3. *Commingling and the time of acquisition*

The rule that the ownership character of an asset is determined at the time of its acquisition may create special problems in the commingling context. If, for example, there has been mixing of separate and community funds in a single bank account, it may still be possible to show the respective amounts deposited in the account, and to show that the use made of withdrawals was separate or community in identified amounts. This type of identification should be sufficient to avoid a commingling conclusion as to the account itself, but when an asset is acquired with funds from the bank account it will nonetheless be necessary to show the character of the respective parts of the account at the time the particular asset was acquired to rebut the presumption that the asset is community property. For instance, to establish that

190. The *Pollock* case, *id.*, is an illustration.

191. *In re* Allen's Estate, 54 Wn. 2d 616, 343 P.2d 867 (1959), involving a stock brokerage account, is an illustration.

192. *In re* Buchanan's Estate, 89 Wash. 172, 154 P. 129 (1916).

193. *Cf. In re* Dewey's Estate, 13 Wn. 2d 220, 124 P.2d 805 (1942). Payment of family operating expenses by the separately-owned corporation (in effect, ignoring the corporate form) does not necessarily involve submergence of the separate property by commingling. *Cf.* State *ex rel.* Van Moss v. Sailors, 180 Wash. 269, 39 P.2d 397 (1934).

194. Holm v. Holm, 27 Wn. 2d 456, 178 P.2d 725 (1947). The net assets of the business apparently steadily increased during the marriage.

195. DuPont de Nemours & Co. v. Garrison, 13 Wn. 2d 170, 124 P.2d 939 (1942). The business at one time had only community funds acquired through borrowing by the husband, *i.e.*, in the separate property sense the business could be said to have reached a negative position and nothing restored it to a positive position.

the separate property part of the account was used to make the acquisition, it will not be sufficient merely to show that the total community expenditures for the operating expenses of the family exceeded the total of the salary or wage income of the spouses during the entire existence of the mixed fund account and contend that hence the community expense must have consumed the community contribution. To avoid the community property presumption and establish the separate character of the acquired asset, the separate claimant must show the dissipation of all community funds in the account at the time the asset in question was acquired,[196] or clearly establish that the separate funds then in the account were used.[197] It should be noted that the allocation to community property income for the spouse's labor in all of these cases must be reasonable and ordinarily is measured by the amount which would be paid for comparable services, [198] although special circumstances may require a greater allocation.[199]

H. Fortuitous Acquisitions

1. Recovery of damages for injury to the spouse

The Washington court has treated the fortuitous acquisition of damages for personal injury inflicted by a third party tortfeasor as community property on the basis that it cannot fit within the separate property sections, and therefore must be community property.[200] While such damages cannot be said to be lucrative, for lack of any donative intent in the payor, neither can they be said to be onerous because they do not depend upon the labor or skill of the spouse.

Although damages for lost wages (harm to earning capacity, a community asset) and medical expenses incurred (probably paid with community funds) are readily classified as community property, dam-

196. In substance this is the analysis in Pollock v. Pollock, 7 Wn. App. 394, 499 P.2d 231 (1972), in which the court rejected the argument that community property income had been consumed in paying family expenses. The analysis in See v. See, 51 Cal. Rptr. 888, 415 P.2d 776 (1966) is particularly helpful.

197. *See* Mix v. Mix,____Cal. App. 3d____, 112 Cal. Rptr. 717 (1974).

198. *See* Friedlander v. Friedlander, 58 Wn. 2d 288, 362 P.2d 352 (1961); *In re* Hebert's Estate, 169 Wash. 402, 14 P.2d 6 (1932).

199. *In re* Buchanan's Estate, 89 Wash. 172, 154 P. 129 (1916).

200. *See, e.g.*, Clark v. Beggs, 138 Wash. 62, 244 P. 121 (1926). The basic case is Hawkins v. Front Street Cable Co., 3 Wash. 592, 28 P. 1021 (1892).

ages for a spouse's pain and suffering[201] would more appropriately be classified as separate property because the noninjured spouse could hardly be said to have a property interest in the injured spouse which necessitates sharing in the recovery. Whether this discrete characterization of the damages will displace the Washington court's blanket community property classification is a question raised by the holding of a recent case.

In *Freehe v. Freehe*[202] the court concluded that interspousal immunity is not the law in Washington, inherently assuming the wife to be separately liable in an action by the husband for injury suffered from operation of her separate property farm tractor, and stated that damages should be awarded to the husband in three parts: (1) Special damages to reimburse for out-of-pocket community expenses from the injury; (2) general damages for loss of future earnings, which would have been community property, in the amount of one-half, as his separate property; and (3) general damages in full for pain and suffering, *etc.*, as his separate property. The court reasoned that this result, *i.e.*, classifying the recovery for pain and suffering as separate property, precluded an indirect benefit to the tortfeasor spouse through sharing in a community property recovery. As the court specifically noted in *Freehe,* however, that case dealt with an interspousal tort suit and not with the community property nature of a recovery from a third party tortfeasor. Nevertheless, that the wife was separately liable in *Freehe* is not necessary to the conclusion that a recovery for pain and suffering is separate property; thus, the same rule may be extended to third party tortfeasor suits.[203]

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201. *See* DEFUNIAK & VAUGHN § 82. The separate character can be found on the basis that the right invaded (to be secure in one's person) either is not "property" at all and therefore not within the community property system as an onerous acquisition, or if property, was owned by the person prior to marriage and therefore is separate.

202. 81 Wn. 2d 183, 500 P.2d 771 (1972). The author's views are more extensively stated in Wash. St. Bar Ass'n, CLE Seminar on Dissolution of Marriage and Family Law Practice 273–91 (1974).

203. California has vacillated from the position of the community character of the cause of action, Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949), to 1957 statutory characterization as separate, to 1968 repeal of the 1957 Act thereby again making it community; however, the 1968 Act eliminated the bar of contributory negligence of the plaintiff's spouse. CAL. CIV. CODE § 5112 (West 1970). The recovery from the other spouse was made separate, *id.*§ 5109. *See* CAL. REV. COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 1389–1402 (1966-67); 1969 CAL. LAW. 349; H. VERRAL & A. SAMMIS, CASES ON CALIFORNIA COMMUNITY PROPERTY 211–15 (2d ed. 1971).

The variant positions of the states are identified in DEFUNIAK & VAUGHN § 86.

The court could have applied the traditional rule in *Freehe* that recovery for pain and suffering is community, although such a recovery perhaps would have benefited the wrongdoer wife. Nonetheless, basic community property rules dictate that the character of an asset (here the recovery) depends upon how it is acquired, rather than from whom it is acquired.[204] This basic principal would indicate that the fortuitous circumstance of the wife being separately *liable* in *Freehe* should not dictate the character of the *recovery*.

Prior to the 1972 amendments, the husband as manager of the community property was held to be the only necessary party plaintiff in a tort action, and in the case of divorce was owner of an undivided half of the undisposed community cause of action and therefore a necessary party in an action for injury to the wife, even after divorce.[205] After the 1972 amendments equalizing the managing power of the spouses, the injured spouse, whether husband or wife, is the only necessary party plaintiff.[206] Doctrines of contributory negligence and imputation of negligence between spouses have also confounded the problems of tort actions by the spouses.[207] Previously the husband's contributory negligence barred an action for the wife's injury.[208] These rules have been changed by R.C.W.§ 4.22.020 which adopts the rule of comparative negligence in Washington and apparently eliminates the imputation of negligence between spouses.[209]

2. *Recovery of damages for injury to property*

While the basic asset in the recovery of damages is the cause of action for the harm done, whether to the person or property of the spouse,[210] tracing to the source asset is obviously appropriate in the case of injury to property. Upon recovery there is, in effect, an involuntary exchange with the cause of action and the character of the subsequent recovery determined by tracing to the character of the dam-

204. This is true except perhaps in acquisitions from the federal government and in some gift situations.
205. Schneider v. Biberger, 76 Wash. 504, 136 P. 701 (1913).
206. WASH. REV. CODE § 4.08.030 (Supp. 1973).
207. *See, e.g.*, Chase v. Beard, 55 Wn. 2d 58, 346 P.2d 315 (1959); 35 WASH. L. REV. 249 (1960).
208. Ostheller v. Spokane & Inland Empire R.R., 107 Wash. 678, 182 P. 630 (1919).
209. *See*, 49 WASH. L. REV. 705 (1974); Editor's Notes, 28 WASH. ST. B. NEWS 4 (1974).
210. Clark v. Beggs, 138 Wash. 62, 244 P. 121 (1926).

aged property; thus, if the damaged property is separate property, so too is the recovery,[211] and if community property, of course, the recovery is community.

I. Right to Reimbursement: The Equitable Lien

The community or separate property character of an asset becomes fixed at the time of acquisition, but subsequent to acquisition, assets of a different character may be used to make payments in connection with the transaction or to contribute to the quality or enhance the value of the asset.[212] Such contributions may give rise to an equitable lien in favor of the contributing "fund" and thereby provide a protection to the contributor without creating in the contributor a share or fraction of ownership in the asset. Analysis of these problems should focus upon the following questions: (1) What is the nature of the right protected? (2) Under what circumstances will it arise? (3) How is it valued? (4) When and by whom may it be asserted?

1. The nature of the right protected

Although the right is commonly referred to as an "equitable lien," the author believes that the better analysis postulates that the contributor has a right to reimbursement[213] protected by an equitable lien. Under usual analyses a lien arises to assure performance of an obligation or duty, or payment of a debt.[214] For the right to arise, therefore, the creating transaction must in effect involve a loan.

2. Circumstances under which the right will arise

The right to reimbursement is undoubtedly predicated upon equitable considerations. Thus, the facts surrounding the contribution must be evaluated to determine where the equities lie and whether the

211. DEFUNIAK & VAUGHN § 86.
212. Whether the multiple character of assets devoted to the transaction control the character of the asset is discussed *supra*, particularly in the mortgage and installment acquisition cases. *See* text accompanying notes 121–68 *supra*.
213. This is the basic Spanish law view, DEFUNIAK & VAUGHN § 373.
214. BLACK'S LAW DICTIONARY 1072, 1073 (4th ed. 1951). *Compare* the analysis in Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 44 WASH. L. REV. 379 (1969).

right to reimbursement will arise. In the usual case, money of a character different from the improved asset has been expended to discharge an obligation[215] or to build or improve a structure,[216] but the contribution may also take the form of labor of the spouse[217] which is in effect a community property contribution. Any one of the funds, separate-wife, separate-husband, or community property, could be the source of the contribution to enhance the asset held in any one of the other two categories.[218]

The typical factual situation giving rise to a right of reimbursement has involved the use of community property funds by the husband to improve his separately owned real estate. Use of community funds by the managing spouse to improve his or her *own* separate property presents the clearest case for recognizing the right. Such use of funds does not change the ownership of the improved asset,[219] and if no protection were given to the community property position, the transaction would amount to a fraud on the community property position and the other spouse.

If the managing spouse uses community property to improve his or her separate property, there is a probability that reimbursement will be due and the community right protected through an equitable lien. On the other hand, if the manager uses his or her separate property to improve community property or the other's separate property, the likelihood that reimbursement will be due is smaller. The determination in both of these cases depends upon the circumstances, including expectations, at the time of the contribution;[220] the right to reimbursement is created then, if at all.

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215. *E.g.*, payment of contract installments, mortgage principal and interest, taxes, maintenance expenses, see cases cited in note 229 *infra*.

216. *E.g.*, Conley v. Moe, 7 Wn. 2d 355, 110 P.2d 172 (1941); *In re* Hart's Estate, 149 Wash. 600, 271 P.2d 886 (1928); Jones v. Davis, 15 Wn. 2d 567, 131 P.2d 433 (1942).

217. Legg v. Legg, 34 Wash. 132, 75 P. 130 (1904); *In re* Estate of Trierweiler, 5 Wn. App. 17, 486 P.2d 314 (1971). *See also In re* Pugh's Estate, 18 Wn. 2d 501, 139 P.2d 698 (1943).

218. The lien was found for the wife's separate contribution to the husband's separate properties in *In re* Trierweiler, 5 Wn. App. 17, 486 P.2d 314 (1971). *See generally* DEFUNIAK & VAUGHN § 73.

219. *See, e.g.*, Leroux v. Knoll, 28 Wn. 2d 964, 184 P.2d 564 (1947); Legg v. Legg, 34 Wash. 132, 75 P. 130 (1904); Merritt v. Newkirk, 155 Wash. 517, 285 P. 442 (1930).

220. Although the reimbursement might later be found to have been made, *see* note 232 *infra*.

When the managing spouse uses community funds to improve the other spouse's separate property, the possibility of a gift exists so that the right to reimbursement may never arise.[221] The circumstances surrounding such use of the community property by the manager must be examined to determine the intention of the contributing spouse. It may be clear that the husband intended a gift, particularly when a home is built upon the wife's separate real property,[222] but his expectation that he would inherit the home can be sufficient to establish the absence of a donative intent.[223] On the other hand, if the contribution can reasonably be viewed as a business investment or as supporting the operation of a business, it is unlikely that a gift of the community property funds will be found.[224] The community property preference and the difficulty of overcoming the basic community property presumption in cases involving a direct gift of an asset to a spouse[225] also suggest that a community property "interest" is likely to remain in such contributions.[226] While the traditional problem has been the husband's use of community funds to improve the wife's separate property, the use of community funds by the wife to improve the separate real property of the husband should pose identical problems under the equal managing power she now has by reason of the 1972 amendments.

If separate property is contributed to improve either the community property or the other spouse's separate property, the claim of the contributor to a right to reimbursement is probably weaker. If the separate property contribution is to community property, the preference with which community property is treated militates against any right in the contributor. Further, in this case as well as where separate property is contributed to the other spouse's separate property, there is

221. There is some suggestion that a gift is presumed, though probably not from the mere fact of such use of the funds. Consider Sackman v. Thomas, 24 Wash. 660, 64 P. 819 (1901).

222. *In re* Hart's Estate, 149 Wash. 600, 271 P. 886 (1928).

223. *In re* Hickman's Estate, 41 Wn. 2d 519, 250 P.2d 524 (1952).

224. *In re* Carmack's Estate, 133 Wash. 374, 233 P. 942 (1925), as explained in *In re* Hart's Estate, 149 Wash. 600, 271 P. 886 (1928); *In re* Estate of Trierweiler, 5 Wn. App. 17, 486 P.2d 314 (1971), regarding community contribution to the husband's separate asset used in business.

225. *E.g., In re* Slocum's Estate, 83 Wash. 158, 145 P. 204 (1915).

226. The "interest" is not an ownership share, however. *See* explanation in W. T. Rawleigh Co. v. McLeod, 151 Wash. 221, 224, 225, 275 P. 701, 702 (1929), of the use of the term in *In re* Carmack's Estate, 133 Wash. 374, 233 P. 942 (1925).

a probability that the contribution is a gift; the presumption of a gift when one spouse purchases property with separate funds taking title in the other spouse's name furnishes a close analogy.[227] Although the contribution is not a title-acquiring transaction, the rule that title to the benefited property is not changed by the contribution[228] in effect shifts the title of the separate property contribution, when it is used for the improvement or payment of the obligation relating to the other spouse's separate property, or their community property, to the owner of the benefited property.[229] Rebutting this presumption of gift involves measuring the facts of the contribution transaction and should be similar to showing the absence of a donative intent when community property is used to improve the other spouse's separate property.

Even in situations other than gifts, the right to reimbursement may not arise because the contributor may have realized some current benefit by using the asset.[230] In addition, if the improved asset is income producing, the claim of contribution may fail by reason of the presumption that the proper fund (the income from the asset) has been used to make the improvement,[231] and also because of the possibility that use of subsequent income from the asset has in substance effected repayment so that there is no longer an equity existing for the contributor.[232]

3. *The value of the right*

When money has been contributed, the amount advanced has been the measure of the right,[233] without particular attention being given to

227. *See* cases cited in note 94 *supra.*

228. *See* cases cited in note 219 *supra.*

229. Payments on a mortgage obligation can give rise to the equitable lien, Merkel v. Merkel, 39 Wn. 2d 102, 234 P.2d 857 (1951); so also payments on a purchase contract, Farrow v. Ostrom, 16 Wn. 2d 547, 133 P.2d 974 (1943); Fritch v. Fritch, 53 Wn. 2d 496, 335 P.2d 43 (1959).

230. *Cf.* treatment of interest, tax and upkeep payments as being "no more than reasonable rental for the use of the land." Merkel v. Merkel, 39 Wn. 2d at 116, 234 P.2d at 864.

231. *See, e.g.,* cases cited in notes 137 & 181 *supra.*

232. This probably was the factual situation in *In re* Woodburn's Estate, 190 Wash. 141, 66 P.2d 1138 (1937); spouses moved onto unimproved, undeveloped land separately owned and made it productive. Income therefrom during the marriage exceeded all expenses relating to the land and with other income was devoted to normal family expenses and investments, conceded to be community property. *Held:* no equitable lien for the community improvement.

233. *See* cases cited in notes 218 & 229 *supra;* Jones v. Davis, 15 Wn. 2d 567,

the possibility that the use of the money may not have increased the value of the asset by the amount advanced.[234] If the contribution is labor, arguably the value of the right should be determined by calculating what would be reasonable wages, but it could be fixed as the incremental increase in value of the thing on which the labor is bestowed. Choosing between the alternatives may be facilitated by considering for whom the protection is sought and the possible results had the contribution been directed to some other purpose. Thus, if a spouse expends community funds in connection with his or her separate property, the claim for the community estate should be the full expenditure, both because the other spouse's interest in those funds would otherwise be depleted without consent and because the funds could be used to secure a full return by almost any other use. A comparable argument can be made if the contribution is labor, *i.e.*, the reasonable value of the labor should be the measure. However, if one spouse works on or expends community funds on the *other* spouse's separate property, without intending a gift, only the increased value should be the measure, because the contributing spouse hardly needs to be protected against an unintended use of the community asset, and there would be a danger that a contrary result could involve giving a power to one spouse to "improve the other out" of his (or her) separate property.[235]

In addition, it is conceivable that the reimbursement amount should be augmented by an interest factor, although consideration of all the equities probably would indicate that the "contributor" has received some benefit through the use of the improved asset which could offset any argument for such an addition to the recovery.[236]

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131 P.2d 433 (1942). However, in Conley v. Moe, 7 Wn. 2d 355, 110 P.2d 172 (1941), the community contributed $2,500 to build a home, but the lien was fixed by the trial court at $2,000. There is nothing in the opinions or the briefs to explain the difference.

234. If the money is used to pay an obligation, *e.g.*, taxes, or mortgage note installment, there would be that much increase in net value, but if the money is used to make physical improvements or repairs, the market value would not necessarily be enhanced equally.

235. An analogy may be drawn to the partition of property that is subject to a co-ownership. In such a partition proceeding a co-owner may not demand an allocation before a division of sale proceeds of more than the amount his improvements increased the sale price. In short, the rules of equity control. 2 AMERICAN LAW OF PROPERTY § 6.18 n.15 (A. J. Casner ed. 1952); 4A R. POWELL, REAL PROPERTY ¶¶ 604, 614 (1973).

236. Professor Bartke cautions that if separate property is improved with community funds, increased benefit may be realized as community property if rents, issues

4. When and by whom may the right be asserted

Obviously, the right to reimbursement is most likely to be asserted when the asset is liquidated or when there is the general settling of "accounts" of the respective spouse's estates; but the right of reimbursement should not be lost merely by dissipation of the asset, or because the contribution was consumed.[237] Between the spouses, the problems have typically arisen when one dies so that there is a settling or ordering of the accounts of their respective estates and interests in connection with the estate administration.[238] They also can arise in identifying community and separate property interests preliminary to a division in divorce.[239]

As between themselves, the husband or wife can assert the right or waive it, assuming no equities between them require a different result, but the assertion of the right by or against creditors presents a more complicated problem. In *Conley v. Moe* [240] the Washington Supreme Court, in a five-four decision, concluded that the trustee in bankruptcy could assert the community equitable lien against the husband's improved separate realty. The dissent contended that since the wife was not asserting any need for such protection of her community position, there was no right which a creditor could reach. There was nothing in the facts of the case to show persuasively that the contributions were intended as gifts of community property to the husband separately, and the argument against finding an equitable lien essentially goes to the effectiveness of relinquishing the right to reimbursement rather than to its creation. As against the creditor, the nature of the original (creating) transaction or the later (relinquishing) transaction ought to be resolved in the creditor's favor unless his opponent(s) can show the good faith quality of the contrary position. The statute[241]

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and profits of the separate property constitute community property or if the improved asset is used for community purposes. However, where rents, issues and profits are separate property (as in Washington) or the improved asset is not used for community purposes, the contrary result is reached. Bartke, *supra* note 214, 44 WASH. L. REV. at 385–86.

237. *See, e.g., In re* Trierweiler, 5 Wn. App. 17, 486 P.2d 314 (1971).

238. Most of the cases cited previously involve estate administration. Here reimbursement, without any necessity of equitable lien analysis, would normally be made.

239. *E.g.,* Merkel v. Merkel, 39 Wn. 2d 102, 234 P.2d 857 (1951).

240. 7 Wn. 2d 355, 110 P.2d 172 (1941).

241. WASH . REV. CODE § 26.16.210 (1963) states:

> In every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of a third person or persons, the burden of proof shall be upon the party asserting the good faith.

supports such a proposition and would protect against the spouses' taking the position currently most advantageous even though that position did not accord with the basic facts of the transaction. It is also possible that the transaction (creating or relinquishing) could amount to a gift in fraud of existing creditors.[242]

In *Farrow v. Ostrom*[243] reimbursement to the wife for separate funds applied toward the purchase of community property was granted priority over the claim of the community creditor, although an earlier case had apparently reached a contrary result.[244] Two other cases suggest the possibility that the "equitable lien" could come ahead of creditors,[245] although the secured creditor may be protected by the recording act.[246] The court concluded in *Leroux v. Knoll* [247] that there was no need to protect the claim against a contract purchaser because the equitable lien could be satisfied out of the proceeds the seller received.

IV. MANAGEMENT AND VOLUNTARY DISPOSITION

The rules controlling management and voluntary disposition of community property, largely settled over the years, have been changed by the 1972 amendments; now, each spouse alone may act effectively, whereas previously only the husband possessed the power.[248] The 1972 amendments also specify new situations in which the joint action of the spouses is required[249] and add a puzzling paragraph concerning community businesses,[250] discussed briefly below.

The bulk of the Washington cases dealing with management and disposition issues antedate the 1972 amendments. These cases, however, remain authoritative and important after the 1972 amendments equalizing the management power between the spouses for two rea-

242. DEFUNIAK & VAUGHN § 174.
243. 16 Wn. 2d 547, 133 P.2d 974 (1943).
244. Walker v. Fowler, 155 Wash. 631, 285 P. 649 (1930). Despite the urging by the dissent in *Walker*, the possibility was not even discussed by the majority.
245. W. T. Rawleigh Co. v. McLeod, 151 Wash. 221, 275 P. 700 (1929); Iredell v. Iredell, 49 Wn. 2d 627, 305 P.2d 805 (1957).
246. Federal Land Bank v. Schidleman, 193 Wash. 435, 75 P.2d 1010 (1938).
247. 28 Wn. 2d 964, 184 P.2d 565 (1947).
248. Ch. 108, § 3 [1972] Wash. Laws, 2d Ex. Sess. 246, *amending* WASH. REV. CODE § 26.16.030 (1963).
249. WASH. REV. CODE §§ 26.16.030(4) & (5) (Supp. 1973).
250. *Id.* § 26.16.030(6).

sons: (1) The analysis defining the ambit of the management and transfer power then held exclusively by the husband is now generally applicable to both spouses; and (2) transactions consummated prior to the 1972 amendments may be governed by the law existing at that time.

A. Inter Vivos Transfers: Joinder Requirements

The statute[251] has long required joint action of the spouses to sell, convey, or encumber community real estate. The 1972 amendments added a joint action requirement in four new situations: (1) To purchase or contract to purchase community real property;[252] (2) to sell, convey or encumber community household goods, furnishings or appliances;[253] (3) to acquire, purchase, sell, convey, or encumber community business assets where *both* spouses participate in the management of the business;[254] and (4) to give community property,[255] although this requirement had been judicially established prior to the 1972 amendments. The discussion here will focus upon the transfer of community real estate, although it should be noted that the analysis developed to satisfy the statutory joint action requirement in the real estate context may find application in the other joint action areas.

1. Classification as real or personal property

Whether the community property asset involved in a particular transaction is to be classified as real property so that joint action of the spouses is required, or as personal property (other than household goods, etc.) so that action of either alone is sufficient is determined by the rules ordinarily applied in other legal contexts. Accordingly, it has been held that joint action is necessary to convey or contract to sell a fee estate in land,[256] encumber the estate by mortgage[257] or lease,[258]

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251. *Id.* § 26.16.030(3). The prior provision to the same effect was § 26.16.040 (1963).
252. *See* section III-F *supra*.
253. WASH. REV. CODE § 26.16.030(5) (Supp. 1973).
254. *See* section IV-B-2 *infra*.
255. WASH. REV. CODE § 26.16.030(2) (Supp. 1973).
256. Colpe v. Lindblom, 57 Wash. 106, 106 P. 634 (1910).
257. Campbell v. Sandy, 190 Wash. 528, 69 P.2d 808 (1937).
258. Bowman v. Hardgrove, 200 Wash. 78, 93 P.2d 303 (1939); Kaufman v. Perkins, 114 Wash. 40, 194 P. 802 (1921).

or create an easement or profit.[259] A community property leasehold, however, is personal property, and it has been held that the husband can transfer it without the wife's participation.[260]

The difference between the *effectiveness* of the transfer and the *character* of the asset acquired by the transfer should be noted. The leasing of community real estate requires joint action because it is either a conveyance of or creates an encumbrance on real estate, but the leasehold acquired is personal property. In contrast, although the granting of an easement or profit similarly encumbers the community real estate, it creates a real property interest in the transferee.[261]

The community property interest of the vendor, after creation of a contract purchaser's interest, has recently been held to be personal property.[262] The purchaser's interest should, therefore, be real property[263] and either an assignment of that interest to a third person or its release to the vendor should require joint action by the spouses. The extent to which the vendors' interest in the real estate can be modified by one spouse acting alone, however, is unclear. As a personal property asset, it can be managed by either spouse, and modification might be merely management so far as community property principles[264] are concerned. If so, the effectiveness of the act would depend upon contract principles beyond the scope of this discussion.[265] Should the court require some kind of joint action,[266] practical resolution of the problem could lie in finding a presumption of the other spouse's approval or concurrence, as has been done in a reformation case.[267]

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259. Bakke v. Columbia Valley Lumber Co., Inc., 49 Wn. 2d 165, 298 P.2d 849 (1956); Northwestern Lumber Co. v. Bloom, 135 Wash. 195, 237 P. 295 (1925).

260. Gabrielson v. Swinburne, 184 Wash. 242, 51 P.2d 368 (1935); Tibbals v. Iffland, 10 Wash. 451, 39 P. 102 (1895).

261. This interest probably can be transferred only by joint action of the spouses, despite the difference in the statutory language of the management statute—real *property*—and the transfer statute—real *estate*. WASH. REV. CODE § 26.16.030(3) (Supp. 1974): "(3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered and such deed or other instrument must be acknowledged by both spouses." Ross v. Howard, 31 Wash. 393, 72 P. 74 (1903).

262. Meltzer v. Wendell-West, 7 Wn. App. 90, 497 P.2d 1348 (1972).

263. *Cf.* Eckley v. Bonded Adjustment Co., 30 Wn. 2d 96, 190 P.2d 718 (1948).

264. It is at least suggested that the husband's act of modifying the contract terms was effective in *In re* Horse Heaven Irrigation Dist., 19 Wn. 2d 89 at 95, 141 P.2d 400 at 403 (1943).

265. For example, could the spouse of the contracting party effectively act?

266. As personal property, its disposition should not require joint action.

267. Keierleber v. Botting, 77 Wn. 2d 711, 466 P.2d 141 (1970).

There is some indication that the husband (and after the 1972 amendments, the wife) acting alone could put someone in possession of community real property as a periodic tenant,[268] suggesting that a management rather than a transfer power had been exercised. Under the 1972 amendments, the tenant could be confronted with a dilemma if the other spouse disagreed and gave notice of the termination of the periodic tenancy. A tenant at will could face similar problems.

The substance of a transaction may support the conclusion that it does not fall within the statutory requirement of joinder. The court has reasonably held that the legal title held by a trustee can be transferred without joinder of the trustee's spouse, the trustee having no beneficial interest in the subject matter of the transfer.[269] This reasoning also might be applied to a fulfillment deed by a vendor of land, particularly if the vendor's interest had been previously transferred to another, but it would be safer to insist that both spouses execute any fulfillment deed of land formerly owned as community real property. The court also has held that some transactions–assignment for the benefit of creditors[270] and the abandonment of oyster lands[271]–do not constitute conveyances within the meaning of the statute and hence do not require joinder. A quitclaim deed from a contract purchaser to his vendor (technically a conveyance by release) might involve a comparable situation if it is really the recognition of the loss of a right by forfeiture. Prior to the extension of management power to the wife, the husband alone could have forfeited the community property interest in a forfeitable executory contract of purchase by defaulting on payments permitting the vendor to declare the forfeiture.[272] Now, however, either spouse can make the payments in the community interest and avoid accrual of the right to forfeit.

2. *Community realty: the joinder requirement*

Although the present statute[273] requires the real estate transfer instrument to be executed by both spouses, the court has held under the

268. *Cf.* Ryan v. Lambert, 49 Wash. 649, 96 P. 232 (1908).
269. Leslie v. Midgate Center, Inc., 72 Wn. 2d 977, 436 P.2d 201 (1967).
270. Thygesen v. Neufelder, 9 Wash. 455, 37 P. 672 (1894).
271. Halvorsen v. Pacific County, 22 Wn. 2d 532, 156 P.2d 907, 158 A.L.R. 555 (1945).
272. But not if done to defraud the wife. Jarrett v. Arnerich, 44 Wn. 2d 55, 265 P.2d 282 (1954).
273. WASH. REV. CODE § 26.16.030(3) (Supp. 1973).

previous statute[274] (when only the husband had managing power) that an instrument executed only by the husband was effective to create the intended rights in the transferee if it could be shown that the wife had authorized the husband to act,[275] estopped herself to deny the effectiveness of the act,[276] or ratified the act.[277] The substance of the joint action requirement is that effectiveness depends upon "participation" by both spouses, and the statutory requirement of joinder in execution of the instrument is only one means of participation. Thus, the failure to meet the statutory standard does not make the husband's (now the spouse's)[278] act void but merely voidable. In addition to becoming bound by "participation," the spouse will become bound on the contract if he or she joins as plaintiff to compel the purchase.[279]

The court has concluded essentially that the requirement of joinder is for the protection of the wife (now the non-joining spouse) and cannot be affirmatively asserted by the transferee. Rather, the transferee must first request joinder and be refused before he can withdraw from the transaction.[280] As suggested in Part III *supra,* comparable analysis ought to be given to "participation" by the non-signing spouse under the new provision[281] requiring joint action of the spouses to *acquire* community real property.

A new provision added in 1972[282] may create a situation in which one spouse, acting alone and without participation of the other spouse, can transfer community real estate: if only one spouse participates in the management of a community business, that spouse alone may transfer the assets of the business (including real estate) without the consent of the other spouse. The dimensions of this possibility are obscure and are discussed briefly in Section IV-B *infra.*

As noted in Section III-A *supra,* the location of the paper title between the spouses does not necessarily establish the location of owner-

274. *Id.* § 26.16.040 (1963).
275. Whiting v. Johnson, 64 Wn. 2d 135, 390 P.2d 985 (1964); Konnerup v. Frandsen, 8 Wash. 551, 36 P. 493 (1894).
276. *E.g.,* Campbell v. Webber, 29 Wn. 2d 516, 188 P.2d 130 (1947).
277. *E.g., In re* Horse Heaven Irrigation Dist., 19 Wn. 2d 89, 141 P.2d 400 (1943).
278. The equal management power of each spouse should mean the initial formal act of the wife can be effective if the husband "participates."
279. Tombari v. Griepp, 55 Wn. 2d 771, 350 P.2d 452 (1962).
280. *See, e.g.,* Stabbert v. Atlas Imperial Diesel Engine Co., 39 Wn. 2d 789, 238 P.2d 1212 (1951); Colcord v. Leddy, 4 Wash. 791, 31 P. 320 (1890).
281. WASH. REV. CODE § 26.16.030(4) (Supp. 1973).
282. *Id.* § 26.16.030(6).

ship, nor its character. Consequently, the appearance of an adequate title in just one spouse in the land records, when in fact the title is held as community property, may mislead a prospective purchaser by suggesting that he may obtain good title by obtaining a conveyance from only that spouse. An 1891 statute[283] is designed to protect a bona fide purchaser from such a record title holder unless the other spouse has recorded a claim of interest in the real estate. However, the difficulty of establishing the position of bona fide purchaser against a community property claim is great,[284] arguably excessive, and practically speaking the statute is a dead letter. Title examiners assume a person who appears to be the sole owner of real estate is married and that the real estate is community property.

3. *Joinder through agency*

Prior to the 1972 amendments, the court had held that the husband could make the wife an agent to conduct community affairs or transactions either directly or indirectly through estoppel or ratification.[285] In ordinary situations, there now will be no need to find that one spouse has been made an agent by the other because both spouses have equal management powers. However, when joint action is required, agency reasoning may be a route to finding the necessary "participation" by both spouses. An intended agency can be established by means of a power of attorney granted by one spouse to the other, as provided by statute.[286]

4. *Emergency powers*

In *Marston v. Rue*[287] the wife, who at that time possessed no management power, was held to have an emergency power to act to protect and preserve community property and to transfer perishable personal property to avoid loss while the husband was unavailable. Such acts now would clearly be within her statutory power as co-manager

283. *Id.* §§ 26.16.095, .100 & .110 (1963).
284. *See, e.g.*, Campbell v. Sandy, 190 Wash. 528, 69 P.2d 808 (1937).
285. Lucci v. Lucci, 2 Wn. 2d 624, 99 P.2d 393 (1940); Wallace v. Thomas, 193 Wash. 582, 76 P.2d 1032 (1938); Short v. Dolling, 178 Wash. 467, 35 P.2d 82 (1934).
286. WASH. REV. CODE § 26.16.090 (1963).
287. 92 Wash. 129, 159 P. 111 (1916).

and would not call for analysis on the basis of emergency. However, where joint action is required to act, there may still be some occasion to premise the effectiveness of the "other" spouse's sole act on an emergency power. The serious absence[288] or the total incompetence [289] of a spouse could present situations in which there should be found an emergency power of one to act for the other[290] or both, although the "perishable" nature of the asset involved, upon which the emergency power in *Marston* was premised, probably no longer will be a factor.

B. *Inter Vivos Management and Transfer Powers of Spouses Acting Alone*

Each spouse acting alone, in the best interests of the community property in a business sense, may now manage and transfer community *personal* property, with the exception of household goods, furnishings or appliances,[291] assets of community businesses,[292] and gifts.[293] In those situations in which one spouse may effectively act alone, the disagreement of the other as to the wisdom of the transaction is immaterial. Under the pre-1972 decisions, when the husband exercised his discretion in the community interest as he saw it, the wife was without power to frustrate his acts;[294] good faith rather than good judgment was the rule. Similarly, the wife's acts should now be equally effective under the 1972 amendments despite the husband's disagreement.

Because in ordinary personal property transactions each spouse may now act alone, there obviously can be competing transferees,

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288. Marston v. Rue, 92 Wash. 129, 133, 159 P. 111, 113 (1916).
289. Foster v. Williams, 4 Wn. App. 659, 484 P.2d 438 (1971).
290. The particular example is the new statutory requirement that the injured spouse or the employed spouse is the necessary party in the actions for personal injury, and for compensation for services, respectively. WASH. REV. CODE § 4.08.030 (Supp. 1973).
291. WASH. REV. CODE § 26.16.030(5) (Supp. 1973).
292. *Id.* § 26.16.030(6).
293. *Id.* § 26.16.030(2).
294. *See, e.g.*, Hanley v. Most, 9 Wn. 2d 429, 115 P.2d 933 (1941): Husband put enough corporate shares in voting trust to give his business associate voting–and managing–control of corporation which previously was in husband's control; wife's challenge unsuccessful. Bellingham Motors Corp. v. Lindberg, 126 Wash. 684, 219 P. 19 (1923): Husband contracted to buy a truck despite wife's belief (known to seller) that the transaction was unwise; she was right but community liability was found nonetheless. If either spouse could contest the judgment of the other, as a practical matter joint participation by the spouses would always be necessary before a third party could safely transact business with the community.

each relying on the act of a different spouse; these problems do not appear to be any different than those involved in competing transfers by partners or competing transfers to more than one transferee in other contexts, and will not be analyzed in this discussion.

1. *Management of community personal property: requirement of a business purpose*

As previously mentioned, the basic rule is that the manager must act in the best interests of the community property in a business sense.[295] While this rule has been traditionally applicable to the husband alone as a community manager, the wife must exercise the equal management powers conferred upon her by the 1972 amendments in a like manner. Essentially, this judicial doctrine originated to preclude the unilateral gift of community property;[296] inter vivos gifts of community property are void *ab initio* and *in toto* without the consent of both spouses.[297] While it has been argued that a community purpose, or at least a permissible disposition of community property, should be found when a child or parent is benefited by the gift, the court has held to the contrary.[298]

The 1972 amendments have merely codified the judicial rule that both spouses must consent to gifts of community property.[299] Thus,

295. Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933). The statute, however, indicates that the managing power over the community property is similar to that over separate property. WASH. REV. CODE § 26.16.030 (Supp. 1973). Before the 1972 changes, the husband's power was similarly stated in WASH. REV. CODE § 26.16.030 (1963) (personalty), but § 26.16.040 (1963) (realty) stated that he had management power over community realty but joint action was required for transfers.

296. The proposition is the basis of the holding in Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933), which overruled Stevens v. Naches State Bank, 136 Wash. 137, 238 P. 918 (1925), wherein the court reasoned that the husband's act of pledging a certificate of deposit as security for their son's debt would have been approved by the wife in all probability.

297. *See* Occidental Life Ins. Co. v. Powers, 192 Wash. 475, 74 P.2d 27 (1937); *In re* Yiatchos' Estate, 60 Wn. 2d 179, 373 P.2d 125 (1962). Since the gift serves no business purpose, it is not within the manager's power and cannot be fully effective; it cannot be partially effective without causing the impermissible division of community property. *See* Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892). Spouses own an undivided one-half interest in each community item—the so called "item" theory. *In re* Estate of Patton, 6 Wn. App. 464, 494 P.2d 238 (1972).

298. *See* Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933); Stevens v. Naches State Bank, 136 Wash. 137, 238 P. 918 (1925); Occidental Life Ins. Co. v. Powers, 192 Wash. 475, 492 *et seq.*, 74 P.2d 27, 34 *et seq.* (1937) (Beals, J., dissenting).

299. WASH. REV. CODE § 26.16.030(2) (Supp. 1973).

case law prior to the 1972 amendments, in which the Washington court nullified life insurance and United States savings bonds beneficiary designations, remains authoritative. The gift reasoning employed in these cases also indicates the result to be reached in some joint bank account problems.

a. Life insurance and United States savings bonds. The court in *Occidental Life Insurance Co. v. Powers*[300] held that the insured spouse cannot designate the beneficiary of a life insurance policy purchased with community funds (a community asset) without the consent of the other spouse. The court treated the inter vivos act of naming a beneficiary as a *gift* of a *vested property right,* even though the insured retained the right to change the beneficiary designation. Since the designation was made without the consent of the other spouse, the court held it was an unauthorized inter vivos gift and void *ab initio* and *in toto.*

The reasoning in *Powers,* however, has been undermined by two subsequent decisions: *In re Towey's Estate*[301] and *Wilson v. Wilson.*[302] In *Towey's Estate* the court recognized that a total disability to change the designation of the other spouse as beneficiary would in effect put present ownership of the policy in the named beneficiary spouse, obviously an unsatisfactory result. Thus, the court upheld a change of beneficiary from the wife to the executor of the insured husband without the wife's consent, creating an exception to the *Powers* rule. The half interest of the wife in the proceeds traceable to the community property policy continued, but the husband was able to dispose of his half of the proceeds payable to his executor by will.

In *Wilson,* the court held that the insurance contract would control, *i.e.,* the beneficiary designation would be given effect, up to the point where it interfered with the community property position, at which point the contract must yield. Hence, the designation of the widow as the beneficiary of three-fourths of the policy was fully effective in that case, and the designation of the insured's sister as beneficiary of one-fourth was effective to the extent of his separate property interest in the policy, which was one-fifth. The balance of five percent was not disposed of by the policy, and went to the widow as representative of

300. 192 Wash. 475, 74 P.2d 27 (1937).
301. 22 Wn. 2d 212, 155 P.2d 273 (1945).
302. 35 Wn. 2d 364, 212 P.2d 1022 (1949).

the community estate, not as beneficiary. The widow in *Wilson* had argued, in effect, that the designation of herself as beneficiary of three-fourths was without her consent,[303] therefore void, and the three-fourths should fall as community property into the estate.[304] Her argument was sound under the *Powers* reasoning.

In *Powers* the newly designated beneficiaries, the insured's mother and secretary, argued that their designation be given effect as a testamentary act. The court rejected the argument because the requisite formalities of a testamentary gift had not been complied with. However, it is clear that the disposition of insurance proceeds at the death of the insured is quasi-testamentary. Under traditional property analysis, the interest of the beneficiary of a policy in which the insured reserved the right to change the beneficiary is a mere expectancy while the insured is alive, and not a vested property right.[305] Hence, there is nothing given until the proceeds become available upon the death of the insured spouse, and the gift is necessarily quasi-testamentary.

Assuredly, to permit the insured spouse to designate a third party as owner of *all* proceeds of a community property insurance policy would interfere with the half ownership of the surviving spouse in the proceeds based on his or her half ownership in the source asset. But at the death of one spouse, any asset, original or derivative, is necessarily no longer community property, and each half can reasonably be subject to individual manipulation through beneficiary designation[306] without invasion of the rights in the other half. The surviving spouse can be protected by limiting the dispositive effect of the instrument to one-half of the asset, even though the phraseology does not speak only

303. A donee can frustrate an attempt to give. *See* R. BROWN, THE LAW OF PERSONAL PROPERTY § 50 (2d ed. 1955).

304. An original designation of a third person as beneficiary, rather than a change from the spouse, is ineffective as an attempt to give under *Powers*. *See, e.g.*, National Bank of Commerce v. Lutheran Brotherhood, 40 Wn. 2d 790, 246 P.2d 843 (1952); California-Western States Life Ins. Co. v. Jarman, 29 Wn. 2d 98, 185 P.2d 494 (1947). The proceeds fall into the estate for administration rather than going to the surviving spouse directly.

305. *See, e.g.*, Schade v. Western Union Life Ins. Co., 125 Wash. 200, 215 P. 521 (1923). This and other cases were distinguished in *Powers* as involving change of beneficiary or transfer of the policy for a proper consideration.

306. The full manipulative power of the insured over the policy is recognized in other situations. *See, e.g.*, surrender of policy for cash, Page v. Prudential Life Ins. Co., 12 Wn. 2d 101, 120 P.2d 527 (1942); pledge to creditor, Seattle Ass'n. of Credit Men v. Bank of California, 177 Wash. 130, 30 P.2d 972 (1934).

of a half share.[307] This is the result in California, both before and after the 1927 statutory declaration that the wife has a present vested half interest in community property, although the *Powers* court distinguished the California cases on the basis of the wife's interest being merely an expectancy there.[308]

Thus, the reasoning in *Powers* that the inter vivos act of naming a beneficiary is an unauthorized gift, and therefore a complete nullity, is vulnerable. Doubt as to whether Washington will continue to apply the *Powers* reasoning was squarely raised by the four-to-four split on the issue in *Aetna Life Insurance Co. v. Brock*.[309] However, the reasoning applied by the court in the United States saving bonds cases supports the continued vitality of the *Powers* rule.

In the savings bonds cases, the Washington court has reaffirmed the *Powers* reasoning. The court in *In re Allen's Estate*[310] rejected the surviving husband's argument that the United States savings bonds purchased with community funds were his separate property because of the federal regulations vesting complete ownership in the registered owner (the husband) and ordered them inventoried as community property in the wife's estate. To hold otherwise, said the court, would permit "a designing spouse [to] at once transform community property into separate property by the purchase of United States bonds."[311] Subsequently, in *In re Yiatchos' Estate*,[312] the Washington court held that bonds purchased by the husband in his name with community funds and which were payable on his death to his brother

307. *Compare* WASH. REV. CODE § 26.16.030(1) (Supp. 1973), limiting testamentary power to half, and the preference for finding no purpose to exceed the limit in the will situations posing election problems, discussed *infra*. In many beneficiary designation situations it seems probable that the insured's spouse has agreed, or at least would not disagree if the question were put. A provision in the insurance code creates a presumption of consent when the beneficiary is a child, parent, brother or sister of either spouse. WASH. REV. CODE § 48.18.440(2) (1963). The presumption is rebuttable, National Bank of Commerce v. Lutheran Brotherhood, 40 Wn. 2d 790, 246 P.2d 843 (1952). It applies even though the naming preceded marriage. Miller v. Paul Revere Life Ins. Co., 81 Wn. 2d 302, 501 P.2d 1063 (1972). The *Powers* reasoning could be abandoned without giving more than "half effect" to the beneficiary designation with the surviving spouse taking the other half.

308. The particular point is identified in a very useful Comment, *Life Insurance Proceeds as Community Property*, 13 WASH. L. REV. 321 (1938).

309. 41 Wn. 2d 369, 249 P.2d 383 (1952).

310. 54 Wn. 2d 616, 343 P.2d 867 (1959).

311. 54 Wn. 2d at 619, 343 P.2d at 869. The Treasury regulations indicate only the registered owner will be recognized. The bonds were registered in the husband's name with the wife as beneficiary.

312. 60 Wn. 2d 179, 373 P.2d 125 (1962).

were within the rule of *Allen's Estate*.[313] Therefore, the designation of his brother as beneficiary without the consent of the wife was ineffective *ab initio* and *in toto* so that the husband's will controlled disposition of his half interest in the bonds and the wife owned the second half as surviving spouse, a result consistent with the *Powers* rule. The United States Supreme Court reversed by invoking federal law,[314] holding that the brother as beneficiary owned the husband's half interest, and that he also should get the wife's half unless she could show the absence of her consent to such use of the funds. The Supreme Court concluded that until the husband's death there had been no interference with the wife's community property position–community property funds had merely been converted into community property bonds–thereby flatly rejecting the *Powers* reasoning which the Washington court had applied. The Washington savings bonds cases, similar to the life insurance cases, thus may be criticized not for establishing the rule that unilateral gifts of community property are void *ab initio* and *in toto*, but for applying that rule in quasi-testamentary situations.

b. Joint tenancy: bank accounts. As noted in the preceding section, the *Powers* reasoning may still survive in situations unaffected by federal rules. Thus, the question arises whether there will be an effect on the rights of the surviving spouse if one spouse puts community funds into a multiple party bank account with third parties and then dies. If the account is held in joint tenancy (with a right of survivorship), arguably there has been an act designed to create a present share of ownership in the co-depositor, and, to the extent this ownership constitutes a gift, the transfer would be beyond the power of the spouse acting alone. But suppose the account created only a right of survivorship without immediate substantive rights. Would this not be the pattern of the *Powers* case?

In *Munson v. Haye*[315] the court concluded that any presumption of the joint tenancy character of an account in the names of both spouses

313. In effect, this is an application of the *Powers* rule–the husband cannot give the community property to himself and thereby make it his separate property. The court also held the Washington statutes stating ownership rested in a surviving beneficiary or co-owner, WASH. REV. CODE §§ 11.04.230 & .240 (1963), do not authorize the husband to convert the bonds into his separate property.

314. Yiatchos v. Yiatchos, 376 U.S. 306 (1964).

315. 29 Wn. 2d 733, 189 P.2d 464 (1948).

was rebutted by proof that the funds put into the account were community property funds, there being nothing more to show an intention of the spouses to change the ownership character of the asset. Since the community character of the funds in the account continued, the wife's withdrawal of funds from the account and their deposit in a similar account in her name and Mrs. Haye's name was an ineffective gift of community property. In *In re Webb's Estate,*[316] the court indicated that the joint bank account contract between the husband and his half-brother would be given effect until it interfered with community property rights. Since the bachelor half-brother had died, survivorship in favor of the husband could not interfere with community property rights and took effect against other heirs of the decedent. The reasoning in *Powers* and in *Wilson v. Wilson,*[317] to which the court referred, would indicate that had the husband died, the half-brother would not be able to claim any part of the account traceable to community funds, and, thus, his survivorship "right" would have no value.

Outside the joint bank account area, the attempt by one spouse to convert community property into a joint tenancy with a third party without the consent of the other spouse will probably fail by reason of the statutory requirement that both spouses join in the writing creating a joint tenancy with community property[318] (unless "participation" might be sufficient).

2. *Community business assets*

Management or transfer of community business property (including real estate) involves unique problems because of the 1972 addition to the basic community property statute of a new paragraph which provides:[319]

> Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the goodwill of a business where both spouses *participate* in its management without the *consent* of the

316. 49 Wn. 2d 6, 297 P.2d 948 (1956).
317. 35 Wn. 2d 364, 212 P.2d 1022 (1949).
318. WASH. REV. CODE § 64.28.010 (1963); *See In re* Estate of Patton, 6 Wn. App. 464, 481, 494 P.2d 238, 248 (1972).
319. WASH. REV. CODE § 26.16.030(6) (Supp. 1973) (emphasis added).

> other: *Provided,* that where only one spouse *participates* in such management the participating spouse may, *in the ordinary course of such business,* acquire, purchase sell, convey or encumber the assets, including real estate, or the goodwill of the business without the *consent* of the nonparticipating spouse.

This provision creates two exceptions to the general rule that either spouse may now manage and transfer community personalty: (1) When both spouses participate in the business, their joint action is required to transfer community business personalty (and realty); and (2) when only one spouse participates in the business, that spouse acting alone may transfer community business personalty (and realty). Three principal questions arise, however, in considering this provision: (1) Under what circumstances do "both spouses participate in . . . management" of the community business? (2) What suffices as "consent" of the other spouse? (3) What are the acts within "the ordinary course" of the business?

It seems probable that an incorporated business will not be within the new provision.[320] The "sole proprietorship" poses the greatest potential difficulty as to participation by both spouses, because such incidental supportive activity as "keeping the books" may be enough to constitute "participation" and require consent of the "sole proprietor's" spouse. As suggested elsewhere,[321] if such minimal involvement is sufficient to constitute "participation," some sort of implied consent to the acts of the principal manager of the business will be necessary to avoid serious practical complications in the conduct of a business. Even if both spouses actively manage the business, implications of authority of each will be necessary to consummate most transactions, *i.e.,* those not clearly of an extraordinary character. Although the protection the required consent provides against total sale of the business may be desirable, and perhaps all the protection necessary, the lan-

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320. If all, or almost all, shares of a corporation are owned by the spouses, it would not be surprising to conclude that the paragraph applied if in the operation of the business the corporate form was largely ignored. Situations in which such a result might be reached are illustrated by State *ex rel.* Van Moss v. Sailors, 180 Wash. 269, 39 P.2d 397 (1934) and *In re* Buchanan's Estate, 89 Wash. 172, 154 P. 129 (1916).

321. Cross, *Equality for Spouses in Washington Community Property Law–1972 Statutory Changes,* 48 WASH. L. REV. 527, 537–41 (1973). The problems raised in the text are more fully discussed in this article.

guage of the paragraph is too detailed to limit its application to total sale, and the scope of interference with less extensive transactions cannot now be predicted.

3. *Litigation*

The 1972 amendments have changed the rules involving litigation.[322] Previously the husband as community manager was a necessary party to any community property litigation. After the 1972 amendments equalizing management power, as a general proposition either spouse can sue or be sued in a community property matter. At least presumptively, proceeds or liabilities flowing from such a suit would be community in character. If only one spouse is named as a defendant and a community liability is sought, it is probable that the equal managing power of each spouse will support intervention by the other spouse.[323]

Several exceptions exist, however, to the general proposition that either spouse may now sue or be sued in a community property sense. In two situations, one spouse is the necessary party: (1) the injured spouse is the necessary party in an action to recover for personal injuries,[324] and (2) the employed spouse is the necessary party in an action to recover for compensation for services rendered.[325] In addition, if a voluntary act of conveyance would be effective only if both spouses participated, *e.g.*, a transfer of community realty,[326] both would have to be joined.

4. *Management power while living separate and apart*

If the spouses have permanently separated, under the analysis in section III-C *supra,* so that future acquisitions will be separately owned,

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322. The author has identified the changes somewhat more fully in Cross, *Equality for Spouses in Washington Community Property Law–1972 Statutory Changes,* 48 WASH. L. REV. 527, 545–46 (1973).

323. *See* discussion in note 322 *supra.*

324. WASH. REV. CODE § 4.08.030(1) (Supp. 1973).

325. *Id.* § 4.08.030(2).

326. In addition to the real property controversies, the transfer or encumbrance of community household goods, furnishings or appliances now fall within this proposition. WASH. REV. CODE § 26.16.030(5) (Supp. 1973).

there may nonetheless remain community property to be managed[327]—mere separation does not affect the community character of existing assets. Prior to the 1972 amendments, the court recognized the necessity of a continuing managing power in the husband, but cautioned that a third person (*e.g.*, a creditor) may not be able to deal with the husband with impunity, for there may be situations in which known facts would suggest that the managing power was being abused.[328] With each spouse now having equal managing power, the potential difficulties are compounded; the author has discussed some possibilities elsewhere,[329] and has suggested that the power be restricted to the reasonable necessities of the situation.

C. Testamentary Powers

1. Intestate succession and testamentary powers in general

As of this writing, upon the *intestate* death of a spouse, the half interest of the survivor in the community property continues,[330] and the decedent's half interest is inherited one-half by the survivor, and one-half by issue or parent(s), or totally by the survivor if there be neither issue nor parent surviving the decedent.[331] Thus, in typical situations, the surviving spouse will become a tenant in common, holding a three-fourths share of the whole of the community property, with the issue or parent(s) of the deceased spouse holding a one-fourth share.[332] The recent revisions to the intestate succession statute, which take effect October 1, 1974, now provide that *all* of the decedent's share of community property passes to the surviving spouse.[333]

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327. *Cf.* Cohn v. Cohn, 4 Wn. 2d 322, 103 P.2d 366 (1940).
328. Dizard & Getty v. Damson, 63 Wn. 2d 526, 387 P.2d 964 (1964).
329. Cross, *Equality for Spouses in Washington Community Property Law–1972 Statutory Changes*, 48 WASH. L. REV. 527, 543–44 (1973).
330. WASH. REV. CODE § 11.02.070 (Supp. 1973).
331. *Id.* § 11.04.015.
332. The law before enactment of the 1965 Probate Code, which became effective July 1, 1967, put all property in the surviving spouse unless issue survived the decedent in which case all of decedent's half went to the issue. Thus, either the surviving spouse had all of the former community property or was tenant in common, having a half share, with their or decedent's children (or grandchildren, etc.) and at least the survivor's step children (etc.), but not as tenant in common with a mother- or father-in-law. The state bar committee had proposed that intestate succession put all of decedent's half in the survivor; this is clearly the preferable result.
333. Ch. 117, § 7 [1974] Wash. Laws, 3d Ex. Sess.

Each spouse has *testamentary* power over one-half of the community property,[334] but no more.[335] Indirectly, however, one spouse could dispose of both halves of the community property in particular assets,[336] or of the whole estate, by putting the survivor to an election.[337] In effect, by putting the survivor to an election the decedent proposes to dispose of the survivor's interest in community property and offers in exchange to the survivor some interest or asset of the decedent's.[338] The crucial question, however, is under what circumstances the surviving spouse will be put to an election. The court of appeals has stated the rule as follows:[339]

> To create the necessity for a widow's election upon the husband's death, there must appear on the face of the husband's will a clear and unmistakable intention to dispose of property which is not in fact his own and which was not within his power of disposition. *Herrick v. Miller,* 69 Wash. 456, 125 P. 974 (1912); *Andrews v. Kelleher,* 124 Wash. 517, 214 P. 1056 (1923); *Collins v. Collins,* 152 Wash. 499, 278 P. 186 (1929). It has been determined that it is immaterial whether the testator knew the property he purported to dispose of in his will was not within his power of disposition, or whether he erroneously believed it to be, because, in either case, if the intention to dispose of it specifically appears, the necessity for an election exists. *Andrews v. Kelleher, supra. See In re Estate of Cooper,* 32 Wn. 2d 444, 202 P.2d 439 (1949).

2. *The community property agreement*

Although negatively stated, a statute[340] authorizes the husband and

334. WASH. REV. CODE § 11.02.070 (Supp. 1973).
335. *Id.* § 26.16.030(1).
336. The item theory of ownership can come into play here. *In re* Estate of Patton, 6 Wn. App. 464, 494 P.2d 238 (1972).
337. *See generally* Comment, *The Widow's Election as an Estate Planning Device in Washington,* 43 WASH. L. REV. 455 (1967). For the decedent to succeed, of course, the survivor has to make the election.
338. Contrast the election problem in common law states where typically the widow could elect to take a dower interest (or some statutory substitute) in her husband's estate or take part of his estate under the terms of his will, *i.e.,* a choice between how and on what basis she took some of his estate, not an exchange of some of her estate for some of his. *In re* Cooper's Estate, 32 Wn. 2d 444, 202 P.2d 439 (1949) involved facts which could have been, but were not, analyzed on the basis of the common law election with probably a change in the result reached.
339. *In re* Estate of Patton, 6 Wn. App. 464, 477–78, 494 P.2d 238, 246 (1972).
340. WASH. REV. CODE § 26.16.120 (1963). "Nothing contained in any . . . law of this state, shall prevent the husband and wife from entering into any agreement [whatever]."

wife to enter into an agreement "concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either." The statute requires the agreement to be executed in deed form, provides that it may be "altered or amended" in the same manner, and specifies that it shall not derogate from the rights of creditors.[341]

Many community property agreements actually executed, which the author calls "three-pronged," go beyond the disposition of the deceased spouse's community property as contemplated by the statute (the third prong) by including, as two more prongs, provisions to convert existing separate property into community property (the first prong) and to establish that future acquisitions by either spouse shall be community property even though such an acquisition would otherwise be separate property (the second prong). These first two "prongs" are discussed in Part V *infra;* the present discussion refers only to a "statutory community property agreement" rather than the broader "three-pronged" agreement and assumes that only community property, however it may come about, is the subject matter of the agreement.

As a dispositive instrument, the agreement takes effect at death, as provided by the statute, and prevails against the will of the decedent.[342] The inter vivos effect of the agreement is controlled by normal contract principles, and while it deprives the spouse who dies first (but not the surviving spouse[343]) of the power to make an effective inconsistent will, it does not modify the rules concerning management or transfer of community property during the lifetime of both spouses.[344] One spouse acting alone cannot revoke the agreement,[345] and even

341. Valuable discussions are in Buckley, *The Community Property Agreement Statute,* 25 WASH. L. REV. 165 (1950); Brachtenbach, *Community Property Agreements–Many Questions, Few Answers,* 37 WASH. L. REV. 469 (1962).

342. *In re* Brown's Estate, 29 Wn. 2d 20, 185 P.2d 125 (1947).

343. Although what property interest the survivor has in former community property can be affected by the agreement which, therefore, indirectly may affect the survivor's testamentary power.

344. *E.g.,* power to convey to a trustee, Hesseltine v. First Methodist Church, 23 Wn. 2d 315, 161 P.2d 157 (1945).

345. *In re* Brown's Estate, 29 Wn. 2d 20, 185 P.2d 125 (1947) (surviving husband had become incompetent; wife's will, apparently designed to accomplish plans the spouses had, ineffective); *In re* Wittman's Estate, 58 Wn. 2d 841, 365 P.2d 17 (1961); *In re* Estate of Lyman, 7 Wn. App. 945, 503 P.2d 1127 (1972), *aff'd and opinion adopted,* 82 Wn. 2d 693, 512 P.2d 1093 (1973) (wife commenced divorce action, asking court to fix rights in community property; husband then made will inconsistent with survivorship provision in agreement; wife took as survivor by force of agreement).

inconsistent acts by both will not nullify the agreement unless there can be found a mutuality of purpose to terminate the agreement.[346]

Although a will cannot prevail against the community property agreement disposition, it is not uncommon for spouses, on advice of counsel, to execute both wills and a community property agreement at the same time, probably with two purposes in mind: First, to increase the likelihood that a common plan for ultimate disposition by the survivor will come into operation;[347] and second, to avoid the consequence that the community property agreement could not operate for lack of an identified survivor,[348] in the event of simultaneous death of both. Of course, a more complicated scheme in the agreement could accomplish both purposes directly.

As a conveyance, the agreement transfers title at the death of one spouse, and if real property is included in the affected assets, the agreement should be recorded to establish the necessary link in the record title. Recordation is not otherwise necessary to the effectiveness of the agreement, although it may be useful to preserve evidence of the existence of the agreement.

Although the statute is clear that a proper writing is necessary to alter or amend the agreement, it is unclear whether total elimination of the agreement can be effected by only a writing. The analysis in both the *Wittman* and *Lyman* cases[349] indicates that adequate mutuality of purpose of both spouses may be shown without a writing. However, the concern expressed by the court in *Wittman* about the stability of recorded titles[350] leaves the matter in doubt, at least as

346. *In re* Wittman's Estate, 58 Wn. 2d 841, 365 P.2d 17 (1961).

347. Note why the wife executed a will; it was argued the agreement was rescinded by reason of his incompetence and her act of making the will. *In re* Brown's Estate, 29 Wn. 2d 20, 185 P.2d 125 (1947). The decedent could not be certain the survivor would not change the will, of course.

348. *Cf. In re* Clise's Estates, 64 Wn. 2d 320, 391 P.2d 547 (1964). Apparently, at times, spouses execute both wills and a community property agreement with a purpose that the survivor can destroy the agreement executed by the decedent that is less advantageous. The risk of not succeeding merely by physically destroying the agreement is patent.

349. *See* note 345 *supra*.

350. Even if mutual repudiation may, under certain circumstances not here present, constitute a rescission, we are not prepared to subject the statutory community property agreement, which serves as a recorded conveyance of property to the surviving spouse, to the cloud of uncertainty such a rule would cast upon the record and, hence, the title to the property.
58 Wn. 2d at 845, 365 P.2d at 20.

regards a possible bona fide purchaser from the surviving spouse who claims under the agreement.

The usual agreement provides simply that the survivor of the spouses shall take all community property[351] without identifying the property particularly.[352] However, the statutory language is broad enough to permit agreements affecting only certain assets rather than all, and also to permit dispositions other than solely to the survivor.[353] It is the author's belief that complete flexibility in dispositive schemes[354] is available and that multiple agreements, each affecting some particular assets but not others, could be executed. By the latter route, spouses could provide for survivorship, for example, with respect to particular assets and at the same time clearly preserve their community property character until one of them died.[355]

In many situations, a survivorship disposition by a community property agreement is too simple, causing complications which could be avoided by testamentary dispositions tailored to the particular situation of the spouses. The following factors need to be considered in deciding whether to use the simple survivorship agreement: Availability of the nonclaim, the award-in-lieu of homestead, and the family allowance statutes of the probate code; out-of-state acceptability of the device;[356] irrevocability of the agreement; valuation of assets at death for capital gains tax purposes; and value of determinations in-

351. *See, e.g.,* suggested form in WASH. REV. CODE ANN. § 26.16.120 at 489 (1961).

352. *See In re* Estate of Verbeek, 2 Wn. App. 144, 467 P.2d 178 (1970) in which the court concluded certain property was treated as being community property and, therefore, subject to the agreement, even though it was not described in any way.

353. WASH. REV. CODE § 26.16.120 (1963). The statute provides that the agreement may affect "the status or disposition of the whole or any portion of the community property"; this language does not require disposition to surviving spouse.

354. *See In re* Dunn's Estate, 31 Wn. 2d 512, 197 P.2d 606 (1948), in which life use and remainders over were set up by an agreement in a form adequate for the statutory community property agreement and a joint will. *Compare* Raab v. Wallerich, 46 Wn. 2d 375, 383, 282 P.2d 271, 275 (1955).

355. An alternative approach would be conversion from community property to joint tenancy ownership, but the inseverability of community property would be lost in joint tenancy (either voluntary or involuntary severance of the half of either spouse) and the certainty that the survivor would take all would also be lost. Such inconsistencies in the incidents of these two types of ownership indicate the illogic, and undesirability, of "community property in joint tenancy form," a hybrid out of California largely occasioned by the absence of dispositive power in the divorce court over separate (*i.e.,* here, joint tenancy) property. *See* Griffith, *Community Property in Joint Tenancy Form,* 14 STAN. L. REV. 87 (1961); Griffith, *Joint Tenancy and Community Property,* 37 WASH. L. REV. 30 (1962).

356. *See* 5 WASH. ST. B. NEWS 33 (1961).

herent in the final decree in probate as to ownership and character of particular assets. Transfer of corporate shares by means of the agreement is facilitated by a 1965 statute,[357] but no statute of general coverage exists. Particularly in larger estates, straight survivorship might be costly in terms of death taxes, but there may be an escape from the worst of such consequences through a recently enacted disclaimer statute,[358] the existence of which might also warrant the execution of a will inconsistent with the dispositive scheme of the agreement.

3. *Simultaneous death*

If the dispositive scheme, however set up, contemplates that a spouse will survive, the simultaneous death of both obviously will frustrate it. Washington has enacted the Uniform Simultaneous Death Act[359] which generally provides that if there is no sufficient evidence that the spouses have died other than simultaneously, and if the spouses have not provided to the contrary, each spouse's property shall devolve as if he or she survived the other.[360] The Act also provides that in the event of simultaneous death of the insured and beneficiary of an insurance policy, the proceeds of the policy shall be distributed as if the insured survived.[361] The Washington court's application of this insurance provision warrants comment.

In re Saunders' Estates[362] involved the simultaneous death of both spouses, each of whom had life insurance policies in which the other spouse was the only beneficiary.[363] The court held that the insurance

357. WASH. REV. CODE § 23.01.226 (1963), reference § 23A.08.325 (1963).
358. Ch. 148 [1973] Wash. Laws 435.
359. WASH. REV. CODE ch. 11.05 (1963).
360. Where the title to property or the devolution thereof depends upon priority of death, and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.
Id. § 11.05.010 (1963).
361. Where the insured and the beneficiary in a policy of life or accident insurance have died, and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.
Id. § 11.05.040 (1963).
362. 51 Wn. 2d 274, 317 P.2d 528 (1957).
363. Some policies provided that the proceeds should go to the executor, etc. of the insured, if the beneficiary was not living at the insured's death. This should not affect the ultimate result.

provisions of the Uniform Simultaneous Death Act controlled so that the asset to be distributed continued to be *proceeds* of the respective policies falling within the particular section of that Act by which the insured is determined to be the survivor,[364] rather than the section which controlled with respect to assets generally, in which the owner of the asset is determined to be the survivor.[365] The court reasoned that the wife had a vested interest in half of the proceeds of the policy on the husband's life which went to her personal representatives, and then to the husband as her heir under the general inheritance statute[366] rather than to her collateral heirs. The result, after applying the same reasoning to the policies on the wife's life, was that all proceeds of policies on the husband's life went to his collateral heirs and all on her life to her collateral heirs. Unfortunately, there was more insurance on his life than on hers. This authority was followed and the same result was reached in *In re Clise's Estates*.[367] The result seems to the author to be unsatisfactory, involving an unfortunate concentration on the word *proceeds* in the statute, and in the latter case overoverlooking the reasoning of an intervening case, *In re Leuthold's Estate*.[368]

It seems unlikely that either spouse would wish the collateral heirs of the other to have a larger share of the property of both spouses, if it is to go at once to collateral heirs, that is, if the other spouse is not at least initially to own the whole in a meaningful, substantial sense. In addition, the framework of the Uniform Simultaneous Death Act is designed primarily for situations in which an individual owner dies simultaneously with a potential successor in ownership,[369] and in the only section which clearly involves deaths of two co-owners,[370] each is deemed to be the survivor as to a half interest. This reasoning militates against the results reached in *Saunders Estates* and *Clises Estates.*

The court in *Saunders' Estates* reasoned that half of the proceeds of the policy in which the husband was the insured went to the wife's

364. *See* note 361 *supra.*
365. *See* note 360 *supra.*
366. WASH. REV. CODE § 11.04.015 (Supp. 1973).
367. 64 Wn. 2d 320, 391 P.2d 547 (1964).
368. 52 Wn. 2d 299, 324 P.2d 1103 (1958).
369. Note the reference in *Saunders' Estates* to Uniform Simultaneous Death Act, 9C UNIFORM LAWS ANN. § 5, recommending amendment in community property states.
370. WASH. REV. CODE § 11.05.030 (1963)–simultaneous deaths of joint tenants.

personal representatives, but this can be so only if the wife, before her death, had the right to the proceeds, and the payment in fulfillment of the duty to deliver proceeds to the owner of them was merely made after her death. However, if the beneficiary wife predeceased the insured husband, there were then no proceeds which she could own, because proceeds do not exist until the insured dies. While it has been convenient to refer to the beneficiary spouse's community interest in a life insurance relationship as existing in the proceeds,[371] in fact the community property interest is in the policy, not the proceeds. Successors of the beneficiary spouse's estate eventually get part of the proceeds upon death of the insured because of their ownership of the source asset, *i.e.*, the policy.

Under this analysis, and that in *Leuthold's Estate,* if the beneficiary spouse died first, as the Act stipulates if both the insured and beneficiary die simultaneously, there necessarily is included in the beneficiary's estate a half ownership in the policy, and his or her successors as half-owners of the policy should own half of the proceeds by reason of ownership of the source asset, *i.e.*, the policy. Ownership in this source asset should pass under the provisions of the Act governing the disposition of assets generally, under which neither spouse is deemed the intestate successor of the other, rather than by focusing upon proceeds. This analysis would place half of the proceeds of all community property life insurance policies in the successors of each spouse, and accord with what the author thinks would be the probable wish of each spouse.

V. TRANSACTIONS AND AGREEMENTS BETWEEN SPOUSES

The statutes bestow full power on either spouse to deal with the other concerning separate property[372] or community property interests,[373] and to give power of attorney to the other or to a third person

371. *See* cases discussed in Part III *supra,* concerning life insurance policy ownership questions.

372. Either may act alone with respect to his or her separate property as fully and to the same extent as if unmarried. WASH. REV. CODE §§ 26.16.010 (1963) (husband). 26.16.020 (1963) (wife).

373. *Id.* §§ 26.16.050 (either may convey the community interest in real property to the other, thereby making it the grantee's separate property). 26.16.150 (1963) (every married person has "right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue or be sued as if he or she were unmarried").

to deal with separate or community property interests.[374] Civil disabilities unique to the wife have been abolished,[375] and she may contract and incur liabilities to the same extent as if she were unmarried.[376]

A. Agreements Between the Spouses

Transactions between the spouses affecting their property may assume the form the author calls "three pronged" community property agreements–the first "prong" of such agreements converts each spouse's existing separate property into community property, the second "prong" provides that each spouse's future acquisitions which otherwise may be separate property shall be community property, and the third "prong" disposes of their community property upon the death of one of the spouses.[377] Of course, the spouses may effect the reverse of the first two "prongs" and provide by "separate property agreement" that their existing property and the future acquisitions of each which otherwise would be community property shall be the separate property of the acquiring spouse. The favor with which community property is viewed, however, imposes a higher standard of proof to establish the existence of separate property agreements than community property agreements.

A question of good faith may arise in a transaction between spouses.[378] When good faith is challenged, the burden of proof is on the party asserting the good faith.[379] The question, however, cannot be raised by subsequent creditors, *i.e.*, those whose interests do not exist at the time of the transaction between the spouses, particularly in light of the statute authorizing direct conveyances between the spouses which protects only "existing equity in favor of creditors of the grantor."[380]

374. *Id.* §§ 26.16.060, .070, .080, .090. Both also can give power of attorney to a third person concerning community property.
375. *Id.* § 26.16.160.
376. *Id.* § 26.16.170.
377. This third "prong" is the statutory community property agreement and is discussed in Part IV *supra*.
378. *See, e.g.*, as to community property, Benham v. Hawkins, 82 Wash. 390, 144 P. 532 (1914); as to separate property, Davison v. Hewitt, 6 Wn. 2d 131, 106 P.2d 733 (1940). Burden of proof falls on the grantee spouse as against the grantor's creditor under § 26.16.210 (1963).
379. WASH. REV. CODE § 26.16.210 (1963).
380. *Id.* § 26.16.050. *See also* Smith v. Weed, 75 Wash. 452, 134 P. 1070 (1913).

1. Transfers of presently-owned property

As provided by statute,[381] a deed of the community interest in real property from one spouse to the other will make that property separately owned by the grantee spouse "unless there is clear and convincing evidence that such was not the intention of the parties."[382] Although there is no statute specifically authorizing the reverse transaction, the court in *Volz v. Zang*[383] established that the spouse(s) may change separate property into community property if the transaction is in proper form and the spouse(s) so intend.[384] In *Volz* both spouses executed an instrument, in accordance with deed requirements, which clearly expressed the intent and purpose that their separate property become community property. After the wife's death, her mother claimed that certain real estate was separate property; the husband contended that it had been changed into community property by the agreement. In holding for the husband, the court noted the policy of the law in favor of community property, that separate property could be changed into community property by commingling or estoppel, and concluded if that be so, then "[separate property] should be allowed to change [into community property] when the parties intend such a change to take place and evidence this intention by a conveyance, conforming in all essentials to the requirements of the law affecting the transfer of real property."[385]

Changing the character of property from community to separate or vice versa is essentially a transfer or conveyance, and the proper form of the transaction depends upon the applicability of the statute of frauds. If a chattel is involved, ordinarily an oral transfer is enough—the cases dealing with gifts of chattels are illustrative and no question is presented there of the necessity of a writing. Obviously, if real property is the subject of the transfer, an acknowledged writing is required by the deed statute.[386] Unfortunately, the matter is somewhat con-

381. WASH. REV. CODE § 26.16.050 (1963).
382. *In re* Monighan's Estate, 198 Wash. 253, 255, 88 P.2d 403, 404 (1939).
383. 113 Wash. 378, 194 P. 409 (1920).
384. A wife's conveyance to her husband of an undivided half interest in her separate property does not create a community property holding but rather a tenancy in common between them. Powers v. Munson, 74 Wash. 234, 133 P. 453 (1913).
385. 113 Wash. at 384, 194 P. at 411.
386. WASH. REV. CODE §§ 64.04.010, .020 (1963). The statutory community property agreement of § 26.16.120 must be executed as deeds are. *In re* Estate of Verbeek, 2 Wn. App. 144, 467 P.2d 178 (1970), involved the question of the effect of

fused by the assertion in *Rogers v. Joughin,*[387] unsupported by citation of any authority, that "the character of property cannot be changed from that of separate property to community property, or community to separate by the oral agreement of the spouses alone."[388] The court in *Leroux v. Knoll* mentioned the same general proposition,[389] citing *Rogers v. Joughin,* and properly concluded that the wife's separate real property had not been converted into community property in that case. However, the sounder statement, recognizing that oral agreements may be sufficient in particular circumstances, was made by the court in *State ex rel Van Moss v. Sailors:*[390]

> It is undoubtedly true that husband and wife may, *by proper agreement or conveyance,* change their separate property into community property and their community property into separate property.

2. *Agreements affecting future acquisitions*

The agreement between the spouses may provide that in addition to existing property, all future acquisitions by either spouse (which would otherwise be separate property) shall be their community property;[391] the result of such an agreement is that neither spouse will have any separate property while both live.[392] Perhaps the most dramatic illustration of such an agreement and of the favor with which commu-

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such an agreement to cover separate property not described but, as the court concluded, intended by the spouses to be the subject matter of the agreement. The lack of description was immaterial on the statute of frauds question for the agreement, just as it was, arguably, in Volz v. Zang, 113 Wash. 378, 194 P. 409 (1920). The assertion by the spouses in the agreement that there was community property, which could have referred only to land, which was in fact separate property, was held to show an intention that it be disposed of as (in effect be converted to) community property.

387. 152 Wash. 448, 277 P. 988 (1929).

388. *Id.* at 456, 277 P. at 991. The court in *Rogers* found the agreement to be ineffective by reason of the statute of frauds relating to contracts in contemplation or consideration of marriage (WASH. REV. CODE § 19.36.010(3) (1963)) and no agreement to change separate property to community property was considered by the court.

389. 28 Wn. 2d 964, 968, 184 P. 2d 564, 566 (1947).

390. 180 Wash. 269, 274, 39 P.2d 397, 399 (1934) (emphasis added).

391. *See, e.g.,* the agreements of *In re* Brown's Estate, 29 Wn. 2d 20, 185 P.2d 125 (1947), and *In re* Wittman's Estate, 58 Wn. 2d 841, 365 P.2d 17 (1961).

392. On this reasoning, what would have been a separately owned judgment from the wife's action for the tort of criminal conversation with her husband was held to have become community property and therefore reachable in enforcement of a community debt owing to the tort judgment debtor in Merriman v. Curl, 8 Wn. App. 894, 509 P.2d 765 (1973).

nity property is viewed is *Neeley v. Lockton*.[393] The court in *Neeley* concluded that the conversion of separate property to community property by execution of a "three-pronged" community property survivorship agreement prevailed over an inconsistent designation of beneficiary pursuant to the provisions of a pension trust. The majority in *Neeley* held that the expectation of the spouses that the agreement fixed the rights of both of them in all property, free of any overlooked contrary schemes, should be protected in promotion of the policy of community property law.

It should be noted, however, that agreements making all future acquisitions community property could be phrased to operate only at the time of death so that all assets would then be transferred as "community property," whether or not otherwise separate property, but the inter vivos character of the assets would remain unaffected. *Volz v. Zang* and *Neeley v. Lockton* reveal the court's desire to give effect to the intention of the spouses, and, therefore, the particular language of the agreement will be important. As to future acquisitions, the following differences in phraseology should result in different conclusions about the inter vivos effect of the agreement:[394]

> It is agreed, that *upon the death of either* of them such property as they now own or may hereafter acquire from any source whatsoever, shall be considered as community property and shall, upon such death immediately become the sole property of the survivor of them.

This language should not affect the inter vivos character of a subsequent acquisition of separate property, permitting such acquisitions to be managed and transferred as separate property until death. With this language compare the following:[395]

> All property, whether real or personal, now or hereafter standing in the name of either party hereto, or in the names of both, or in which either or both of us now or hereafter shall have any interest, is hereby

393. 63 Wn. 2d 929, 389 P.2d 909 (1964). The decedent had designated his second wife as beneficiary of the company pension plan and after marriage to his third wife joined her in execution of the "three-pronged" community property agreement. The disputed proceeds were the product of his half of the community property accruals during the first two marriages, and the accruals from his employment between his respective divorces and subsequent marriages.

394. *In re* Brown's Estate, 29 Wn. 2d 20 at 24, 185 P.2d 125 at 128 (1947) (emphasis added).

395. *In re* Wittman's Estate, 58 Wn. 2d 841 at 842, 365 P.2d 17 at 18 (1961).

> constituted and shall be treated for all purposes as the community property of both of us, and upon the death of either one of us the title thereto shall vest in the survivor to the exclusion of everyone else.

This language should preclude classification of any subsequent acquisition as separate property.

If after the execution of an agreement providing that their future acquisitions shall be community property, the spouses live separate and apart so that their respective subsequent acquisitions in the absence of the agreement would normally be separate property,[396] it is unclear whether the agreement remains effective. The author believes, however, that the agreement should be held mutually abandoned and ineffective so that their subsequent acquisitions are separate property. *In re Estate of Lyman*[397] perhaps tends in the opposite direction.

Spouses may agree, as indicated by the above discussion, that their future acquisitions shall be community property; conversely, spouses may agree that subsequent acquisitions by either, which ordinarily would be community property, shall be the separate property of the acquirer.[398] Although in *Yake v. Pugh*[399] the court reasoned that the separate character of the wife's earnings pursuant to a separate property agreement resulted from consummation of the husband's continuing intention to make a gift to her, later cases indicate the separate character exists immediately and directly upon acquisition of the asset by force of the agreement. Both the confidential relationship between spouses and the statutory requirement of proof of good faith in transactions between them require that separate property agreements be fair and just.[400]

Characterization of an asset acquired by the efforts of either spouse as separate property runs counter to fundamental principles and presumptions of community property law, and the rule is well fixed that clear and convincing evidence is necessary to sustain the contention that a separate property agreement exists.[401] In two fairly recent

396. Discussed in Part III *supra*.
397. 7 Wn. App. 945, 603 P.2d 1127 (1972).
398. *See, e.g.*, Gage v. Gage, 78 Wash. 262, 138 P. 886 (1914); Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 P. 1088 (1911); Union Securities Co. v. Smith, 93 Wash. 115, 160 P. 304 (1916).
399. 13 Wash. 78, 42 P. 528 (1895).
400. *See, e.g., In re* Madden's Estate, 176 Wash. 51, 28 P.2d 280 (1934) and Hamlin v. Merlino, 44 Wn. 2d 851, 272 P.2d 125 (1954) (antenuptial agreement).
401. State v. Miller, 32 Wn. 2d 149, 201 P.2d 136 (1948).

cases, *Kolmorgan v. Schaller*[402] and *Mumm v. Mumm*,[403] the court has indicated that in addition to showing the existence of the agreement, there must also be a clear showing that the agreement has been mutually observed.

In *Kolmorgan* there was a written agreement [404] which the wife argued established that her subsequent earnings were her separate property and thus not reachable by a community creditor. However, the wife had used her earnings to pay ordinary family expenses. The court thus concluded that the agreement had not been observed and, therefore, did not control to prevent the application of the ordinary community property rules under which her earnings would be community property. While in earlier cases the court had commented on the spouses' observance of their agreement, no particular point was made that it was an independent element to establish the effectiveness of the agreement. Since particular expenditures in *Kolmorgan* were made to cover family expenses, which by statute[405] would be her separate liability in any case, the author is not persuaded that such potentially involuntary payments should indicate a lack of observance of the separate property agreement,[406] even if continued observance is necessary for its vitality.

In *Mumm* the court concluded that the continued commingling of funds by the spouses after executing a written separate property agreement prevented adequate tracing to individual earnings or separate property of either party; hence, the disputed assets were found to be community property. The result in *Mumm,* however, does not seem supportable on this reasoning. If the agreement originally took effect, there would have been only separate property, and the confusion of the separate property of two persons cannot create community property; while the respective separate property shares of the spouses might be difficult to establish, certainly there could have been no difficulty in initially identifying earnings of each.

402. 51 Wn. 2d 94, 316 P.2d 111, 67 A.L.R. 2d 704 (1957); *noted in* 33 WASH. L. REV. 112 (1958).
403. 63 Wn. 2d 349, 387 P.2d 547 (1963).
404. The briefs reflect that the agreement may not have done more than divide existing assets. No point is made of this in the opinion.
405. WASH. REV. CODE § 26.16.205 (Supp. 1973) (the family expense statute).
406. *See* 33 WASH. L. REV. 112 (1958); Parsons v. Tracy, 127 Wash. 218, 220 P. 813 (1923), rejecting argument that separate property agreement made voluntary the payment of expenses of last illness.

In addition to the commingling rationale, the court in *Mumm* also relied on the fact that "the evidence established that the separate property agreement was not mutually observed by the parties; hence, it did not change the status of the community property [citing *Kolmorgan*]."[407] However, the result in *Mumm* is sound on either one of two bases without relying on mutual observance as an element to establish the effectiveness of the agreement: (1) That the written agreement was never implemented so that there was no way to identify which then-existing assets were traceable to community earnings or to separate property of either, and consequently the community property status from the pre-existing commingling just continued; or (2) that their subsequent disregard of the agreement amounted to an abandonment of it, so that the separateness of property created by the agreement was subsequently lost by commingling with community property acquired after the abandonment of the agreement. The latter explanation seems factually improbable because the agreement was made on August 25, 1958, and the action for divorce was started on June 28, 1960. As a result, the time between execution of the agreement and commencement of the divorce was so short that it would be hard to show that the agreement had been effective initially, but by subsequent conduct the spouses had abandoned it. The author, therefore, believes that the correct explanation of the *Mumm* case is the former explanation: that despite execution of the formal agreement, the parties failed to implement it. Thus the question of the significance of lack of mutual observance after initial implementation of the agreement still remains, this point not being necessary to, and therefore left unresolved by, the decision in either *Kolmorgan* or *Mumm*.

In most cases, the separate property agreement has not been put in writing, and adequate proof of the agreement will be found only if there is conduct of the spouses from which there can be a strong inference supporting their assertion that they had made such an agreement. In this sense, therefore, mutual observance probably will be essential to establish the existence of the asserted oral agreement. If the agreement's existence is beyond dispute, however, *e.g.*, because it is in writing, mutual observance should be significant only as to such questions as abandonment of the agreement or the agreement's operative

407. 63 Wn. 2d at 352, 387 P.2d at 549.

effect in particular factual situations, but not as an independent element to establish the effectiveness of the agreement.

Do separate property agreements have a different operative effect depending upon whether the subsequent acquisition is real or personal property? In *Graves v. Graves*[408] the court stated that an oral separate property agreement affecting real property would be void as contrary to the basic community property statute and contrary to the requirement that conveyances of real estate be by deed. An oral agreement, however, should control the character of acquired property whether that property is real or personal. As previously indicated, if the real property asset is community property, the statute of frauds prevents an oral change in its character, but that analysis is irrelevant to the question of the character of the asset upon acquisition.[409]

For instance, when the spouses effectively change all assets into separate property of one or the other, all income from such assets will be separate property under the statutes,[410] and if the spouses have agreed that subsequent earnings shall be the separate property of the acquirer,[411] there will be no assets of a community character which can be the source of a community property acquisition.[412] Hence, a comprehensive separate property agreement may dissolve the community property position.

The separate property agreement will not be given effect to insulate what otherwise would be community property from the community creditor whose basic claim existed at the time of the agreement.[413] It will be effective against the subsequent creditor whether he knew of the agreement[414] or not.[415]

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408. 48 Wash. 664, 94 P. 481 (1908). In addition to the statement referred to in the text, the court concluded the facts indicated there was no agreement.

409. *See* G. McKAY, COMMUNITY PROPERTY § 968 (2d ed. 1925).

410. WASH. REV. CODE §§ 26.16.010, .020 (1963).

411. This can be done. *See, e.g.*, Gage v. Gage, 78 Wash. 262, 138 P. 886 (1914).

412. It might be argued that a credit acquisition would be community property because the obligation would presumptively be a community debt, but the absence of existing community property to establish credit in substance should mean the credit, too, is separate.

413. Marsh v. Fisher, 69 Wash. 570, 125 P. 951 (1912).

414. Union Securities Co. v. Smith, 93 Wash. 115, 160 P. 304 (1916).

415. Piles v. Bovee, 168 Wash. 538, 12 P.2d 914 (1932). The suggestion in G. McKAY, COMMUNITY PROPERTY § 902 (2d ed. 1925), that the agreement would not be effective against the subsequent creditor if the spouses continued to live together, obviously was not applied; it appears possible, however, that the nonacting spouse claiming insulation by reason of the agreement might have misled the creditor and thereby be unable to get the protection claimed.

B. *The Acquiring Transaction and Title: The Possibility of a Gift*

Prior to the 1972 amendments, if community funds were used by the husband to acquire an asset, title to which was put in the wife's name, there was inherently some indication that the husband, as manager, intended by placing title in his wife's name to consummate a gift (either of the funds or the asset) which she would then own as her separate property. However, the basic community property presumption and the requirement that there be clear proof of a gift impeded the establishment of a title-changing transaction.[416] Where the wife, who at that time possessed no managing power, acquired an asset with title placed in her name, she was likely to be treated as a substitute manager in a community property acquisition rather than as a donee.[417] After the 1972 amendments equalizing management power between the spouses, the acquisition of an asset with community funds by either spouse and placement of title in either the acting spouse's or the nonacting spouse's name clearly should rest within the basic community property presumption.[418]

Despite the basic community property presumption and the resulting practical difficulty in establishing a gift from one spouse to the other, either subsequent to the acquisition transaction or as the inherent character of that transaction, there is one factual pattern in which comparatively slight evidence may be sufficient to establish separate ownership in one spouse by gift. In *Johnson v. Dar Denne*[419] the question arose whether rings purchased with community funds were the separate property of the wife or subject to replevin by the

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The provision in the Marriage Dissolution Act, WASH. REV. CODE § 26.09.070(2) (Supp. 1973), may support an argument that recording a separate property agreement is required. The section does not necessitate such a result. Rather, it authorizes recording a separation contract, which with published notice "shall constitute notice to all persons . . . of the facts contained in the recorded document."

416. The basic analysis, involving three different factual patterns, appears in *In re* Slocum's Estate, 83 Wash. 158, 145 P. 204 (1915). The spouses may desire a life insurance policy to be the separate property of the noninsured spouse to keep the proceeds out of the estate of the insured spouse. The gift problem is likely to be involved. *See, e.g.*, Kern v. United States, 491 F.2d 436 (9th Cir. 1974), in which the court concluded there was adequate proof to make one policy the separate property of the surviving, noninsured spouse but not another policy.

417. *Cf.* Jones v. Duke, 151 Wash. 108, 275 P. 72 (1929). Car acquired with community funds in her bank account, wife stated in license application to be owner, county assessed car as owned by wife; held, community property.

418. *See* note 416 *supra*.

419. 161 Wash. 496, 296 P. 1105 (1931).

surviving husband against the wife's donee. In affirming the trial court's determination that one ring was the separate property of the wife, the court said:[420]

> In an action such as this, when the rights of creditors are not involved, and as between the husband and wife only, jewelry or articles of personal adornment, acquired after marriage with community funds, but worn and used solely by the wife, will be held to be the separate property of the wife by gift from the husband upon comparatively slight evidence.

Thus, two elements appear to be required to establish a gift on this theory: (1) That the acting spouse has acquired an article peculiarly appropriate for the use and enjoyment of the other spouse; and (2) that the other spouse has in fact so used it. The gift character of the total transaction will still be the ultimate question,[421] although after the 1972 amendments it should be proper to substitute "spouse to spouse" for the "husband to wife" reasoning of the court in *Johnson*.

C. *Joint Tenancies and Tenancies in Common*

In addition to changing community property into the separate property of one spouse, the spouses can convert their community property ownership into a common law form of co-ownership, either a joint tenancy or a tenancy in common. Survivorship and other incidents of the joint tenancy are sufficiently different from community property incidents to indicate that the respective interests of spouses as joint tenants are separate property.[422] Normally if the spouses agree not to have community property, an acquisition to which both contributed would apparently be a tenancy in common.[423] The automatic survivorship of a joint tenancy, although not certain to occur, may have enough appeal to persuade spouses to abandon community property protections by converting to a joint-tenancy holding. The author does not perceive any particular reason, however, why the spouses

420. *Id.* at 497, 296 P. at 1106.
421. Note the conclusion as to jewelry of the husband in *In re* Dougherty's Estate, 27 Wn. 2d 11, 176 P.2d 335 (1947); diamond-studded wrist watch given, but not a ruby tie clasp or a diamond ring.
422. *Cf.* DEFUNIAK & VAUGHN § 134.
423. WASH. REV. CODE § 64.28.020 (1963).

would change community property into a separate property tenancy in common.

By Washington law, a joint tenancy may be created in real or personal property, but only by a written instrument, which may be "from husband and wife, when holding title as community property, or otherwise, to themselves or to themselves and others, or to one of them and to another or others . . . ."[424] In addition to this general statute, other statutory provisions relating to "bank"[425] accounts encompass situations in which community property-joint tenancy problems can arise.

When the husband and wife are co-depositors (or shareholders) in an account and have signed the usual signature cards specifying the agreement between themselves and the institution, there probably will be no serious problem in proving their concurrence in the arrangement. The nature of the arrangement between the depositors, however, is not necessarily established merely by the right of the survivor to control the account; the account may be joint, *i.e.*, multiple party, without being held in joint tenancy.[426]

Munson v. Haye[427] involved the possibility that through the bank account statutes, creation of a joint account would convert deposited community property funds into a separate property-joint tenancy asset. The applicable statute in *Munson* provided that two persons could jointly become "members" of a savings and loan association and that the survivor could exercise all rights with reference to the

424. *Id.* § 64.28.010. The attempt to create a joint tenancy between the husband and a child from community property was frustrated by lack of the necessary writing in *In re* Estate of Patton, 6 Wn. App. 464, 494 P.2d 238 (1972).

425. The term "bank" account is used for convenience although two of the statutes refer to savings and loan associations (WASH. REV. CODE § 33.20.030 (1963)) and credit unions (*id.* § 31.12.140 (1963)), respectively, rather than either mutual savings banks (*id.* §§ 32.12.010, .030(3) (1963)) or commercial banks (*id.* § 30.20.015 (1963)).

426. *Compare* Wash. Rev. Code §§ 30.20.010 (1963) (joint deposits) and 30.20.015 (joint deposits with right of survivorship). Under the former provision the bank could pay the survivor and thereby discharge its liability on the account; under the latter, the deposits "become the property of such persons as joint tenants with the right of survivorship," and the making of the deposit is to "be conclusive evidence . . . of the intention of both depositors to vest title . . . in such survivor." Part of the variety of possible accounts in mutual savings banks is listed in § 32.12.010, and § 32.12.030(3) sets up the same pattern as that in § 30.20.015. The credit union statute, § 31.12.140, permits payments to the survivor but does not refer to the depositors as joint tenants. The savings and loan statute formerly was similar but it was replaced by the express language of joint tenants with right of survivorship in 1945, *see id.* § 33.20.030.

427. 29 Wn. 2d 733, 189 P.2d 464 (1948).

"shares"; but the statute did not (before its amendment in 1945) refer to the depositors as joint tenants.[428] Mrs. Munson withdrew funds from a savings and loan account carried in the names of both her and her husband and composed of deposits of community property funds, and opened a new account with Mrs. Haye to facilitate gifts she (Mrs. Munson) intended to make. Although expressing doubt as to the soundness of the contention, the court accepted the argument that there arose a presumption that the interest of the spouses in the savings and loan account was held in joint tenancy. The court *held,* however, that the presumption "ceased to exist" when it was shown that the funds deposited were community property:[429]

> . . . [E]vidence that was clear, certain, and convincing was required to establish that [the spouses] intended to change the status of community property by giving to either the right to appropriate all or any part of the account to his or her own use and to divest the other of all interest in the part so appropriated. *In re Slocum's Estate,* 83 Wash. 158, 145 Pac. 204. The parties here signed nothing which indicated an intention to create a joint tenancy, and the statute relied upon makes no reference to joint tenancies.

The court stated that the mutual savings bank statute[430](which did refer to "joint tenancy") would give rise to a presumption of a joint tenancy, but pointed out that even that statute was conclusive as to the joint tenancy intention only as regards survivorship, and not with respect to changing the character of inter vivos ownership. The court noted the 1945 change of the savings and loan statute expressly providing for joint tenancy, and stated, parenthetically, that even had it been applicable the result would nonetheless be the same. This dictum poses difficulty.

Two transactions are involved in the formation of an account with more than one depositor: the transaction between the named depositors, and the transaction between them and the institution. While the statutes are primarily acquittance statutes for the protection of the institution, as the court indicated in *Munson,* their effect on the transaction between the depositors should not be ignored. The preference

428. The pre-1945 savings and loan statute was similar to the current credit union statute, *see* note 426 *supra.*

429. 29 Wn. 2d at 743, 189 P.2d at 470.

430. The commercial bank statute is the same. *See* note 426 *supra.*

with which the community property ownership of spouses is viewed can reasonably be held to require clear proof of an intention to change community property to joint tenancy ownership when the only basis for presuming an inter vivos change in character is the statute permitting the *survivor* to have full control of the account.[431] On the other hand, if the inter vivos transaction between the spouses clearly states that they have become joint tenants,[432] it seems reasonable, contrary to the dictum in *Munson,* to give that effect to the transaction, unless the contention that no change from community property was intended is adequately proven. The problems of permitting the parties to debate the significance of the form of the transaction (unless fraud or lack of good faith[433] is asserted) support the position that a clear statement on the signature card that the account is in joint tenancy should preclude its classification as a community property asset.[434]

The statutory requirement[435] of a writing to change community property into joint tenancy and the reasoning in *Munson v. Haye*[436] indicate that if real property acquired by the spouses is intended to be held in joint tenancy, the transaction ought to be accompanied by their signatures accepting the joint-tenancy form on the deed or in a separate writing clearly stating their intention. A similar problem exists with respect to bonds, corporate shares and similar assets. It is not clear that a standing order to a stock broker to acquire in the name of the customers as joint tenants should by itself be adequate to convert an otherwise community acquisition into a joint tenancy acquisition. The power of spouses to agree that future acquisitions *by either* be the separate property of the acquirer[437] is not entirely analogous to a continuing agreement that future acquisitions *by both* be other than the preferred community property ownership. On the other hand, if the joint tenancy bank account transaction will control the character of

431. If the statute merely protects the institution the survivor would not necessarily be owner of the account; even if the statute provides that the survivor is sole owner it does not necessarily follow that there was an inter vivos change from community property. *Compare* a statutory community property agreement involving survivorship.

432. *Cf.* Anderson v. Anderson, 80 Wn. 2d 496, 495 P.2d 1037 (1972).

433. Consider WASH. REV. CODE § 26.16.210 (1963).

434. The problems are reflected in Griffith, *Community Property in Joint Tenancy Form,* 14 STAN. L. REV. 87 (1961) and Griffith, *Joint Tenancy and Community Property,* 37 WASH. L. REV. 30 (1962).

435. WASH. REV. CODE § 64.28.010 (1963).

436. *See* note 427 *supra.*

437. Discussed in text accompanying notes 398–400.

ownership of subsequent deposits, as suggested above, the argument can be made that the authorization to the stock broker should similarly be effective. There are no cases answering these questions.

D. *Divorce (Dissolution)*

While transactions which convert all community property to the separate property of one or the other spouse are possible, such total conversion is not likely unless the spouses plan dissolution of either the community relationship[438] or the marital relationship. Such a conversion changes titles immediately,[439] but remains subject to the power of a divorce court to make a different allocation in its decree. By Washington's new dissolution of marriage statute, the power of the court to change the disposition made by the spouses has been restricted to situations in which the court finds that "the separation contract was unfair at the time of its execution."[440]

If the marital relationship between the parties no longer exists by reason of divorce (dissolution), the prerequisite to community property is gone. Therefore, the former community property, if not changed from its community status by a transfer while the two were married and if not allocated by the divorce (dissolution) court,[441] will be held by the former spouses as equal tenants in common.[442] It is possible that the tenancy-in-common claim of the former spouse may be barred by collateral estoppel,[443] but if the ownership is not in some way barred, it can be asserted after the title-holding former spouse dies. Moreover, the ownership asserted by the surviving former spouse is unaffected by any probate nonclaim-statute reasoning because the

438. Both a marital and a family relationship can exist without community of property, *e.g.*, when there is present conversion to separate property and an agreement that future acquisitions be separate property. *See also* G. McKAY, COMMUNITY PROPERTY § 897 (2d ed. 1925). *Cf.* deFUNIAK & VAUGHN §§ 134, 135, 136. *See also* Parsons v. Tracy, 127 Wash. 218, 220 P. 813 (1923).

439. *In re* Garrity's Estate, 22 Wn. 2d 391, 156 P.2d 217 (1945).

440. Ch. 157, § 7(3) [1973] Wash. Laws, 1st Ex. Sess. WASH. REV. CODE § 26.09.070(3). *See* Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375 (1974).

441. It is the duty of the court to allocate property brought before it. Bernier v. Bernier, 44 Wn. 2d 447, 267 P.2d 1066 (1954).

442. Ambrose v. Moore, 46 Wash. 463, 90 P. 588 (1907).

443. *Cf.* Witzel v. Tena, 48 Wn. 2d 628, 295 P.2d 1115 (1956); Dean v. Nat'l Bank of Wash., 57 Wn. 2d 822, 360 P.2d 150 (1961).

assertion is not a claim against the decedent's estate but rather exercise of an ownership right.[444]

VI. INVOLUNTARY DISPOSITION

The statute has long provided that "community real estate shall be subject . . . to liens of judgments recovered for community debts, and to sale on execution issued thereon."[445] This statutory provision necessitated classifying debts as community, enforceable against community real property, or as separate, and therefore enforceable only against the separate property of the obligor. Each spouse has power to incur separate obligations,[446] but in general neither spouse has power to impose separate liability on the other.[447] The important question usually is whether the act of a spouse creates community liability in addition to separate liability, since as a practical matter it is likely that the acting spouse has no separate property out of which a judgment may be satisfied but only community property interests held with the nonacting spouse.

The early cases distinguished between enforcement of the husband's separate debts against community personal property, over which he then was held to possess greater management power because of the statutory provision that he had " a like power of disposition as he has of his separate personal property,"[448] and enforcement of his separate debts against community real property,[449] over which the dispositive power was joint.[450] In addition, there was the possibility that debts referred only to voluntary obligations and that a different rule controlled enforcement of involuntary obligations, such as those imposed by statute or resulting from tort liability.[451] Both of these distinctions were eliminated in *Schramm v. Steele*,[452] where the court concluded

444. Olsen v. Roberts, 42 Wn. 2d 862, 259 P.2d 418 (1953); Smith v. McLaren, 58 Wn. 2d 907, 365 P.2d 331 (1961).
445. WASH. REV. CODE § 26.16.040 (Supp. 1973).
446. *Id.* § 26.16.150 (1963).
447. *Id.* §§ 26.16.010, .020, .190, .200 (Supp. 1973). The family expense statute provides the exception. *Id.* § 26.16.205.
448. *Id.* § 26.16.030 prior to the 1972 amendments.
449. Powell v. Pugh, 13 Wash. 577, 43 P. 879 (1896).
450. WASH. REV. CODE § 26.16.040 prior to 1972 amendments. The joint power statement is now in § 26.16.030 (Supp. 1973).
451. *See* Brotton v. Langert, 1 Wash. 73, 23 P. 688 (1890), particularly the dissent.
452. 97 Wash. 309, 166 P. 634 (1917).

that the husband's broader management power over personal property was not based on greater proprietary rights, but rather on a management agency which could not support enforcement of his separate obligation, whether voluntary or involuntary, against either community real or personal property. Further, the court long ago concluded that a separate creditor could not reach his debtor's undivided half interest in community property,[453] because the resulting ownership of the nondebtor spouse would fit neither the separate nor the community property definitions.[454] Thus, basically the entire community property interest is protected from separate obligations.[455]

A. Contractual Obligations

1. Postnuptial obligations

The contracting spouse of course incurs separate liability[456] by making the contract, and the important question usually is whether a community liability also was incurred. The basic presumption that a debt incurred by either spouse is a community debt, and thus enforceable against the community property, is not lightly rebutted.

a. The basic presumption of a community obligation. The ordinary debt transaction of the manager will involve the acquisition of an asset, which by the rules previously discussed will be presumptively community property; correlatively, the debt incurred by the contracting spouse is presumptively community in character.[457] Debts incurred in direct management of community property similarly are presumptively community debts, and if there is an intent to benefit the community property position by incurring the debt, it will be enforceable against community property.[458]

453. Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892). The request to permit enforcement of a separate obligation against the husband's half interest in community property was denied in Aichlmayr v. Lynch, 6 Wn. App. 434, 493 P.2d 1026 (1972).

454. The awkwardness can arise through enforcement of federal liens, discussed in text accompanying notes 531–40 *infra*.

455. The partial retreat from this position is discussed in text accompanying notes 522–45 *infra*.

456. The wife was separately liable as party to the contract, individually, in Short v. Dolling, 178 Wash. 467, 35 P.2d 82 (1934); George C. Lemcke Co. v. Nordby, 117 Wash. 221, 200 P. 1103 (1921); Conrad v. Mertz, 45 Wash. 119, 87 P. 1118 (1906). Consider also WASH. REV. CODE §§ 26.16.150, .170 (1963); §§ 26.16.190, .200 (Supp. 1973).

457. Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 P. 1058 (1892).

458. Beyers v. Moore, 45 Wn. 2d 68, 272 P.2d 626 (1954).

Prior to the 1972 amendments, all debts of the husband were presumed to be community debts,[459] since he was the manager of the community property and presumably was acting for the community.[460] The wife, lacking management power at that time, did not create community liability by her ordinary obligatory acts.[461] The husband could make the wife the agent to conduct community affairs,[462] however, so that community liability would follow, or, by his ratification or through estoppel, he could be precluded from denying that she created a community obligation.[463] Such reasoning is, of course, no longer necessary after the 1972 amendments establishing the wife's equal management authority; rather, debts incurred by either spouse now will be presumptively a community debt.

If both spouses join in the contract, both will be separately liable and usually there will be community liability.[464] The signature of the other spouse, however, adds nothing to the character of the liabilities, the only significance of that joinder being to create the second separate liability. This was the explanation by the court in *Northern Bank & Trust Co. v. Graves*[465] where the wife was found separately liable when she signed notes executed by her husband.

While most of the problems discussed in this section do not arise until enforcement of the obligation is sought, and hence are appropriately discussed as involuntary dispositions, several aspects of contrac-

459. *See, e.g.*, Bryant v. Stetson & Post Mill Co., 13 Wash. 692, 43 P. 931 (1896); Fies v. Storey, 37 Wn. 2d 105, 221 P.2d 1031 (1950); Malotte v. Gorton, 75 Wn. 2d 306, 450 P.2d 820 (1969).

460. *See, e.g.*, Bierer v. Blurock, 9 Wash. 63, 36 P. 975 (1894); Fies v. Storey, 37 Wn. 2d 105, 221 P.2d 1031 (1950); Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 P. 1058 (1892); Capital Nat'l Bank v. Johns, 170 Wash. 250, 16 P.2d 452 (1932).

461. Streck v. Taylor, 173 Wash. 367, 23 P.2d 415 (1933).

462. WASH. REV. CODE §§ 26.16.060–.090 (1963); Wallace v. Thomas, 193 Wash. 582, 76 P.2d 1032 (1938); Lucci v. Lucci, 2 Wn. 2d 624, 99 P.2d 393 (1940).

463. Colagrossi v. Hendrickson, 50 Wn. 2d 266, 310 P.2d 1072 (1957); Hartman v. Anderson, 49 Wn. 2d 154, 298 P.2d 1103 (1956); Short v. Dolling, 178 Wash. 467, 35 P.2d 82 (1934); Bowers v. Good, 52 Wash. 384, 100 P. 848 (1909).

The harshness of the odd conclusion that no community liability attached to the husband's employment of a broker to find a buyer of community real estate (Geoghegan v. Dever, 30 Wn. 2d 877, 194 P.2d 397 (1948), because it would in effect encumber the real estate without the necessary participation by the wife, was ameliorated in Whiting v. Johnson, 64 Wn. 2d 135, 390 P.2d 985 (1964), where she was held to have authorized his act. The *Geoghegan* case analysis is, in the author's opinion, unsound inasmuch as the obligation to pay for the personal service would encumber real estate only if it were reduced to judgment, in the same way as for any contract debt.

464. *See, e.g.*, Conrad v. Mertz, 45 Wash. 119, 87 P. 1118 (1906).

465. 79 Wash. 411, 140 P. 328 (1914). *See also* this point made by Judge Stiles, quoted in note 476 *infra*.

tual obligations are more appropriately discussed in a management context. Thus, as previously discussed in Part IV *supra*, neither the disagreement of the nonacting spouse over the wisdom of the obligation,[466] nor the acting spouse's lack of good judgment[467] in undertaking the obligation, nor the nonacting spouse's lack of knowledge of the obligation[468] affects its community character. It is necessary, however, that the obligation not amount to a gift, *i.e.*, that it be incurred for a community "business" purpose,[469] although the community benefit need not be actually realized.[470]

b. Rebutting the basic presumption. The basic presumption of community liability can be rebutted only by clear and convincing evidence,[471] and the burden of proving that only separate liability was incurred by the acting spouse rests on the proponent of the limited liability.[472] Except in situations of a gift of community credit,[473] transactions clearly related to separate property,[474] or an effective separate property agreement between the spouses, it may be impossible to establish the separate character of the debt of either spouse without a clear understanding with the creditor that there was to be no community liability.[475] As the following discussion indicates, there has been almost a total erosion of the holding (and the apprehensions it

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466. *See, e.g.*, Bellingham Motors Corp. v. Lindberg, 126 Wash. 684, 219 P. 19 (1923); Baker v. Murrey, 78 Wash. 241, 138 P. 890 (1914); Byrne v. Sanders, 17 Wn. 2d 56, 134 P.2d 941 (1943).

467. *See* cases cited in note 466 *supra*.

468. Capital Nat'l Bank v. Johns, 170 Wash. 250, 16 P.2d 452 (1932).

469. Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933). *But see* note 492 and accompanying text *infra*.

470. Way v. Lyric Theater Co., 79 Wash. 275, 140 P. 320 (1914); Beyers v. Moore, 45 Wn. 2d 68, 272 P.2d 626 (1954). It is sufficient if there is some benefit received even though it is not initially equal to the obligation incurred. Lincoln Trust Co. v. Spangler, 121 Wash. 267, 209 P. 521 (1922).

471. Beyers v. Moore, 45 Wn. 2d 68, 272 P.2d 626 (1954). In Zarbell v. Mantas, 32 Wn. 2d 920, 204 P.2d 203 (1949), absence of even indirect community benefit was shown.

472. Beyers v. Moore, 45 Wn. 2d 68, 272 P.2d 626 (1954).

473. Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933). In effect community credit is treated like any other asset which cannot be given unless both spouses concur. *See* discussion in Part IV *supra* and WASH. REV. CODE § 26.16.030(2) (Supp. 1973).

474. Union Securities Co. v. Smith, 93 Wash. 115, 160 P. 304 (1916); Piles v. Bovee, 168 Wash. 538, 12 P.2d 914 (1932); Steward v. Bounds, 167 Wash. 554, 9 P.2d 1112 (1932).

475. A community obligation may arise in favor of an intended transferee (essentially *quantum meruit*) who has partly performed in a transaction not specifically enforceable because both spouses had not participated. In Graves v. Smith, 7 Wash. 14, 34 P. 213 (1893), plaintiff recovered the value of surveying services even though they were intended as part payment for an unenforceable contract to convey community real

raised[476]) that a community liability could not be found in transactions principally of benefit to third persons, such as obligations arising through accommodation endorsement, guaranty, or suretyship; the dimensions of "community debt" have become, in effect, extremely broad.

The presumption of the community character of the debt created when funds are borrowed is supported when they are used for community purposes,[477] but their use for separate purposes, whether or not previously contemplated by both spouses, [478] does not overcome the community presumption. As between the spouses, if the security given the lender is separate property, the funds acquired may reasonably be considered to be separate property,[479] but this has no bearing on the character of the obligation.[480] The ownership character of funds bor-

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property. The new requirement of joinder in transactions involving community household goods, etc., may also present this problem. *See* WASH. REV. CODE § 26.16.030(5) (Supp. 1973).

476. Brotton v. Langert, 1 Wash. 73, 86, 23 P. 638, 690–91 (1890) (Stiles, J., dissenting):

> A community debt, within the meaning of the act of 1881, ought to be any liability incurred by either husband or wife during their marriage, and which is not a separate debt by its express terms, or by reason of its being patently for the exclusive benefit of the separate property of the party contracting it . . . .
>
> I cannot believe that it was the intention of the legislature of 1881 to withdraw all this community real estate from liability for accommodation endorsements, guarantees, and especially official bonds, as well as the hundred engagements that married men enter into every day, but which have no relevancy to their community interests, and cannot be said to benefit them. It is said that these obligations can be made good by securing the signature of the wife; but I deny it. If the signature of a husband to the bond of a county treasurer does not make the obligation collectible out of his community real property, because the debt is not one for the benefit of the community, it is idle to say that adding the signature of the wife will change the character of the debt and make it so collectible. And so on. The combinations and confusions are endless, if this doctrine is once announced.

The negative inferences from the quoted language of Judge Stiles' dissent identify well the dimensions of the community debt concept.

477. *See, e.g.*, Flies v. Storey, 37 Wn. 2d 105, 221 P.2d 1031 (1950).

478. As in Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934), and *In re* Finn's Estate, 106 Wash. 137, 179 P. 103 (1919). *See also* Gould v. Culver, 148 Wash. 689, 270 P. 93 (1928), in which the wife did not know of the transaction; the court concluded that the transfer of the funds to the husband's brother was not shown to be a gift, but rather there was some indication of conveyance of land by the brother to the husband, which supported the presumption of the community character of the transaction. The court also noted that the funds borrowed were presumptively community.

479. *In re* Finn's Estate, 106 Wash. 137, 179 P. 103 (1919); *In re* Bubb's Estate, 53 Wn. 2d 131, 331 P.2d 859 (1958), *discussed in* 34 WASH. L. REV. 147 (1959). *See also* Graves v. Columbia Underwriters, 93 Wash. 196, 160 P. 436 (1916).

480. *In re* Finn's Estate, 106 Wash. 137, 179 P. 103 (1919). The court in Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934), asserted the borrowed funds were community property available for any community use. This conclusion is con-

rowed as between husband and wife does not control the character of the debt.[481] In both *In re Finn's Estate*[482] and *Auernheimer v. Gardner*,[483] the funds acquired were separate, but the lender insisted upon the husband's joinder in the notes; the only reasonable inference is that the creditor intended to acquire a community obligation, which makes it extremely difficult to overcome the presumption of a community obligation.

If some community property benefit, direct or indirect, can be found, the presumption of community liability will not be overcome. For example, a purpose to benefit the corporation which employs the husband or of which he is an officer or director will supply sufficient indirect benefit,[484] even though the corporation is insolvent.[485] The position of the surety spouse as a shareholder also evidences sufficient community property benefit, although if the shares are separate property the indirect benefit and the attendant obligation will be separate.[486] Expectation of employment likewise will suffice as a community benefit,[487] as will promotion of sale of a community property asset.[488] The obligation by which funds are acquired will create community liability even though there is an accompanying lending transaction of the borrowed funds to a third person which cannot do more than balance the borrowing;[489] the same result follows even though the com-

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trary to the intention of the spouses as reflected by the uses made of the funds. *Cf.* National Bank of Commerce v. Green, 1 Wn. App. 713, 463 P.2d 187 (1969), where the distinction between the character of the obligation and the character of funds borrowed also is unfortunately blurred.

481. Consider also Riverside Finance Co. v. Griffith, 140 Wash. 322, 248 P. 786 (1926); the court concluded that the husband's testimony that he considered his business acquisitions to be separate property controlled even though a purchase money mortgage signed by both spouses was given for part of the purchase price; as to the part represented by the purchase money mortgage, this case was overruled by Walker v. Fowler, 155 Wash. 631, 285 P. 649 (1930), which indicates the presumption of community debt acquisition was not overcome.

482. 106 Wash. 137, 179 P. 103 (1919).

483. 177 Wash. 158, 31 P.2d 515 (1934). In *Finn's Estate* the acquisition was held to be the wife's separate property; Graves v. Underwriters, 93 Wash. 196, 160 P. 436 (1916), has the same result; as to *Auernheimer, see* note 480 *supra*.

484. Horton v. Donohoe Kelly Banking Co., 15 Wash. 399, 46 P. 409 (1896).

485. Proff v. Maley, 14 Wn. 2d 287, 128 P.2d 330 (1942).

486. Union Securities Co. v. Smith, 93 Wash. 115, 160 P. 304 (1916).

487. Beyers v. Moore, 45 Wn. 2d 68, 272 P.2d 626 (1954).

488. Armour & Co. v. Becker, 167 Wash. 245, 9 P.2d 63 (1932); *see also* Kuhn v. Groll, 118 Wash. 285, 203 P. 44 (1922).

489. Northern Bank & Trust Co. v. Coffin, 113 Wash. 326, 194 P. 404 (1920); Malotte v. Gorton, 75 Wn. 2d 306, 450 P.2d 820 (1969). *See also* Acme Finance Co. v. Zapffe, 161 Wash. 312, 296 P. 1050 (1931).

posite result promotes only recreational opportunities for the spouse.[490] The latter possibility, and the reasoning in tort cases that recreational activity is beneficial to the community,[491] suggest that a community "business" purpose test may be met by any activity except that clearly related to separate property or clearly donative.[492]

While the husband alone cannot give community credit, which is treated the same as any community asset, an obligation which has no correlative benefit in a community property sense may be incurred in return for a previous community benefit. This was the situation, for example, when the husband joined his son on a note for the price of land the son purchased, the son previously having worked on the family farm without compensation.[493] Unless the wife objects, the husband can give community credit to her just as he can give her his interest in any community property. Such a gift of credit was involved when borrowed money was used to acquire property subsequently held to be the wife's separate property in one case,[494] and was used for the wife's separate purposes in another.[495]

A renewal obligation normally will have the same character as the original obligation, so that a separate obligation will not bind the community property merely by renewal.[496] However, a subsequent community obligation may result from an intent to give community credit in support of the separate obligation of a spouse, even though no benefit can be found to the community property position.[497] A similar problem exists in a transaction reviving an obligation the enforcement of which has been barred. If the original obligation was commu-

490. Olympia Bldg. & Loan Ass'n v. McCroskey, 172 Wash. 148, 19 P.2d 671 (1933).

491. *See* note 553 *infra*.

492. *See, e.g.*, Union Securities Co. v. Smith, 93 Wash. 115, 160 P. 304 (1916); Peterson v. Zimmerman, 142 Wash. 385, 253 P. 642 (1927); Sun Life Assurance Co. v. Outler, 172 Wash. 540, 20 P.2d 1110 (1933). On this reasoning community liability could be found if a spouse joined in the obligation of a nonprofit corporation in whose activity the spouse participated, *e.g.*, a charitable or recreational organization.

493. Reed v. Loney, 22 Wash. 433, 61 P. 41 (1900).

494. *In re* Finn's Estate, 106 Wash. 137, 179 P. 103 (1919).

495. Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934). In both this case and *Finn's Estate* the wife's separate real estate was mortgaged to secure payment of the notes both spouses had signed.

496. First Nat'l Bank v. Estus, 185 Wash. 174, 52 P.2d 1243 (1936); Meng v. Security State Bank, 16 Wn. 2d 215, 133 P.2d 293 (1943); National Bank of Commerce v. Green, 1 Wn. App. 713, 463 P.2d 187 (1969).

497. This argument was presented in Meng v. Security State Bank, 16 Wn. 2d 215, 133 P.2d 293 (1943), but the payee was unable to establish that the wife had agreed to give community credit.

nity in character and the managing spouse has made a payment after enforcement was barred, presumptively a community purpose was served by the revival of the obligation,[498] and in the absence of proof to the contrary, community liability will continue. In *Gannon v. Robinson*[499] the court held that the presumption of community liability by the husband's revival, without the wife's knowledge or consent, of an obligation discharged in bankruptcy had been clearly overcome by proof that the act was not for the benefit of the community. Although the revival would not fall into the category of a gift of community credit in support of a separate obligation, it is possible that a community purpose was served which ought to recreate the community obligation. The court in *Gannon* recognized this possibility: "We leave open the question as to the liability of the community if the husband, in order to establish a necessary credit standing or to otherwise benefit the community, revives a discharged community obligation."[500]

c. Separate liability of the nonacting spouse and the family expense statute: three-way liability. A spouse's act creating both community liability and separate liability in the acting spouse ordinarily does not create separate liability in the nonacting spouse who has not participated in the transaction, *i.e.*, it ordinarily does not create three-way liability.[501] For example, the listing of the nonacting spouse's separate assets in a financial statement does not establish the necessary promise to pay,[502] nor is separate liability established by the nonacting spouse's mere signing of a financial statement.[503] Finding the husband as manager separately liable for the wife's contracts which create a community liability is still possible on the basis of *Lucci v. Lucci*,[504] but the author believes such a result is no longer sound after the 1972 amendments.[505]

498. Catlin v. Mills, 140 Wash. 1, 247 P. 1013, 47 A.L.R. 545 (1926), *as explained in* Gannon v. Robinson, 59 Wn. 2d 906, 371 P.2d 274 (1962). Mapes v. Mapes, 24 Wn. 2d 743, 167 P.2d 405 (1946), followed *Catlin*, concluding that the husband's note for previous loans, which were barred by the statute of limitations, was executed within his managing power.

499. 59 Wn. 2d 906, 371 P.2d 274 (1962).

500. 59 Wn. 2d at 907, 371 P.2d at 275.

501. WASH. REV. CODE §§ 26.16.010, .020, .030 (Supp. 1973).

502. Glaze v. Pullman State Bank, 91 Wash. 187, 157 P. 488 (1916).

503. Yakima Plumbing Supply Co. v. Johnson, 149 Wash. 257, 270 P. 829 (1928). She may be a party to the contract, however; *see* cases cited in note 456 *supra*.

504. 2 Wn. 2d 624, 99 P.2d 393 (1940).

505. Cross, *Equality for Spouses in Washington Community Property Law—1972 Statutory Changes*, 48 WASH. L. REV. 527, 548–50 (1973).

An exception to the general rule that the acting spouse binds only himself or herself separately and presumptively the community property, but not the nonacting spouse separately, is the family expense statute.[506] That statute provides that "expenses of the family and the education of the children, including step-children, are chargeable" upon the community property of both and *the separate property of either,* for which they may be sued jointly or separately. A family may be without children or dependents and consist simply of husband and wife.[507]

In *Yates v. Dohring*[508] the court held that the existence of a family relationship was a prerequisite to extending liability separately to the husband for expenses incurred in the wife's room and board, at least when the creditor knew that the wife had commenced a divorce action and the spouses were *permanently* separated. It is possible that dissolution of the spouses' family relationship would not restrict the application of the family expense statute on behalf of a creditor who continued a pre-existing pattern of extending credit or on behalf of a new creditor who knew nothing of the lack of the family relationship.[509] However, the separate property agreement cases[510] arguably indicate that the subsequent creditor at least could not successfully assert that the nonacting spouse was separately liable in the absence of the family relationship, except on the basis of estoppel or similar reasoning.

Whether the obligation falls within the statutory "expenses of the family and the education of the children" will depend on the type of expense[511] and on the situation of the particular family. Prior to the 1972 amendments, the court had indicated that the husband's man-

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506. WASH. REV. CODE § 26.16.205 (Supp. 1973).

507. *In re* DeNisson, 197 Wash. 265, 84 P.2d 1024 (1938).

508. 24 Wn. 2d 877, 168 P.2d 404 (1946). Mere separation does not end family relationships, Russell v. Graumann, 40 Wash. 667, 82 P. 998 (1905); nor does confinement for incompetence, *In re* DeNisson, 197 Wash. 265, 84 P.2d 1024 (1938); *see also* Rustad v. Rustad, 61 Wn. 2d 176, 377 P.2d 414 (1963).

509. In Parsons v. Tracy, 127 Wash. 218, 220 P. 813 (1923), the husband was able to recover the expenses of her last illness from his wife's estate despite a separate property agreement in which she agreed not to make any demand for maintenance and support on the basis, in part, that the payment was not voluntary. The court said, "[a]s between Mr. and Mrs. Parsons, the relationship of husband and wife had ceased by mutual agreement, but as to the public they were still husband and wife and as such, under the statutes and decisions of this court, the husband was liable to pay these bills." *Id.* at 223, 220 P. at 814. No cases or statutes were cited by the court.

510. *See* Part V, text accompanying notes 414–15 *supra.*

511. Yates v. Dohring, 24 Wn. 2d 877, 168 P.2d 404 (1946) (room and board); Strom v. Toklas, 78 Wash. 223, 138 P. 880 (1914) (house rental); Roller v. Blodgett, 74 Wn. 2d 878, 447 P.2d 601 (1968) (house rental); *In re* DeNisson, 197 Wash. 265,

aging power gave him considerable discretion in determining whether a doubtful acquisition should be accepted as a family expense.[512] That managing power now rests in either spouse, with the result that the concern of the nonacting spouse will relate to his or her potential separate liability rather than the ordinary previous concern of the husband about both his separate and the community liability. This will necessitate, in the doubtful areas, a focus on the appropriateness of the purchase for the particular family, whether the asset has been used by the family, whether a family expense statute has a broader sweep than a "necessities" statute, and similar factors.[513]

d. Effect of living separate and apart. An awkward and undefined area of potential community liability exists when the spouses have permanently separated, under the analysis in Section III-C, without eliminating the community property character of existing assets. Obviously, the community property does not lose its character merely by separation, and the necessary management of the community property while the spouses are separated can create obligations. In *Dizard & Getty v. Damson,*[514] the wife had expressly authorized the husband to continue as manager of the community business, and, by implication, the court held, to incur community debts. Therefore, the creditor could enforce his claim against nonbusiness assets, formerly community property, assigned to the wife in the subsequent divorce. If there were no express authorization by the nonacting spouse to continue the community business, there would be some force in the argument that the scope of the acting spouse's power to incur community liabilities

84 P.2d 1024 (1938) (ordinary maintenance and support); Hinson v. Hinson, 1 Wn. App. 348, 461 P.2d 560 (1969) (child support); Werker v. Knox, 197 Wash. 453, 85 P.2d 1041 (1938) (clothing); Parsons v. Tracy, 127 Wash. 218, 220 P. 813 (1923) (expenses of last illness); Russell v. Graumann, 40 Wash. 667, 82 P. 998 (1905) (expenses of last illness); Roberts v. Warness, 165 Wash. 266, 5 P.2d 495 (1931) (medical and surgical care); Butterworth & Sons v. Teale, 54 Wash. 14, 102 P. 768 (1909) (*perhaps* funeral expenses). *See generally* 41 AM. JUR. 2d *Husband and Wife* §§ 371 *et seq.* (1968).

The expenses for education of the children would seem in some families to include college expenses, but the reduction of the age of majority to 18 may affect the result. Cleaver v. Cleaver, 10 Wn. App. 14, 516 P.2d 508 (1973); *held,* trial court erroneously decreed support after age 18 to cover four years of undergraduate college education.

512. Bush & Lane Piano Co. v. Woodard, 103 Wash. 612, 175 P. 329 (1918); Jones, Rosquist, Killen Co. v. Nelson, 98 Wash. 539, 167 P. 1130 (1917); each involving purchase of a piano, in which only separate liability against the wife was found, the husband not having authorized the purchase, directly or indirectly.

513. The problems are generally discussed in 41 AM. JUR. 2d Husband and Wife §§ 371 *et seq.* (1968).

514. 63 Wn. 2d 526, 387 P.2d 964 (1964).

should be no greater than required by the reasonable necessities of the situation; a creditor might be able to reach only the assets actually "managed"—for example, the assets used in the business.

After a permanent separation, no community relationship exists between the spouses to support a presumption of the community character of a debt unrelated to the community property at hand.[515] Unless the nonacting spouse could be bound by estoppel or on some similar basis, insulating the community property held by that spouse would be reasonable,[516] even if it should not be insulated from a "business" creditor. Some other possibilities have been discussed briefly elsewhere.[517]

2. *Antenuptial obligations*

As a general proposition, antenuptial obligations of either spouse, which are necessarily separate obligations, cannot be enforced against the community property of the spouses,[518] or against the separate property of the other spouse.[519] Even the obligation of both which has been renewed after their marriage cannot be enforced against their community property.[520] This so-called "marital bankruptcy" discharge from antenuptial obligations has been narrowed in scope in

515. *Compare* the effect of the separate property agreement on subsequent creditors, discussed in Part V *supra*.

516. The acting spouse could create only separate liability (except through managing the continuing community property); probably the community property held by the nonacting spouse would become that spouse's separate property which would not thereby become reachable; the other community property would probably become the actor's separate property and thereby reachable by his (or her) separate creditor even if it might be unavailable to the creditor while it was community property.

517. Cross, *Equality for Spouses in Washington Community Property Law–1972 Statutory Changes*, 48 WASH. L. REV. 527, 543–44 (1973).

518. Consider, for example, WASH. REV. CODE § 26.16.040 (Supp. 1973), permitting enforcement against community real estate only for community debts; the inability of a separate creditor to reach the debtor's half interest in community property. *See also* Snyder v. Stringer, 116 Wash. 131, 198 P. 733 (1921).

519. WASH. REV. CODE § 26.16.200 (Supp. 1973).

520. Katz v. Judd, 108 Wash. 557, 185 P. 613 (1919). Just as is true as to assets, an obligation will retain the character of its origin if it can be traced and there is nothing but renewals involved in the changes in form. Some of the reasoning in the out-of-state obligation cases, which formerly might involve only separate liability, could support abandonment of the rule of Katz v. Judd, but the original debt was there incurred during marriage and thus a change of the *Katz* rule is not inevitable (or perhaps even desirable). *Contrast* the reasoning of Escrow Serv. Co. v. Cressler, 59 Wn. 2d 38, 365 P.2d 760 (1961) and the later analysis of Household Finance Corp. v. Smith, 70 Wn. 2d 401, 423 P.2d 621 (1967).

three areas: (1) alimony and child support, (2) federal tax liens imposed by federal supremacy reasoning, (3) new statutory vulnerability of postnuptial earnings and accumulations.[521]

a. Alimony and child support. In *Fisch v. Marler*[522] the court identified the conflict between the principle protecting community property from separate obligations and the principle supporting enforcement of alimony and child support responsibilities after a divorce. The court held the former principle was subordinate to the latter; alimony and child support claims are enforceable by garnishment of the husband's wages, after his remarriage, at least to the extent that there will not be an inequitable invasion of the community property rights of the new wife (and family). The court held that the trial court "had power to exercise its discretion in allocating the garnished funds according to the necessities of the parties concerned."[523]

Subsequently, in *Stafford v. Stafford,*[524] the court refused to recognize unpaid alimony as a basis for a lien against community *real* property, although apparently recognizing it as a lien upon community personal property, noting the difference in the husband's managing power at that time over personal and real property. This distinction was long ago abandoned[525] and its revival in *Stafford* is unfortunate. The court, however, also noted that the question of the lien quality of an award of lump sum alimony was not before it; if, therefore, the *Stafford* case means merely that the particular antenuptial obligation in that case will not have normal lien quality against the community real property, it may be reasonable (but not for the reason stated), and the case does not necessarily put community real property beyond the equitable claims and considerations involved in the *Fisch* case. There are, as yet, no cases clarifying this point.

The dissenting judge in *Stafford* suggested that the new wife merely had married an "encumbered husband"–encumbered with alimony and child support claims from his former marriage. With one exception, later cases clearly can be rationalized on this theory. Thus, in *Dillon v. Dillon*[526] and *Verde v. Verde,*[527] the court held that the ali-

521. *See* note 541 *infra.*
522. 1 Wn. 2d 698, 97 P.2d 147 (1939).
523. *Id.* at 716, 97 P.2d at 155.
524. 10 Wn. 2d 649, 117 P.2d 753 (1941).
525. Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917).
526. 34 Wn. 2d 12, 207 P.2d 752 (1949).
527. 78 Wn. 2d 206, 471 P.2d 84 (1970).

mony obligation fixed at a percentage of the former husband's income (as reported for federal income tax purposes) was to be calculated without regard to its community property character from the subsequent marriage, *i.e.*, the entire community interest, and not just the husband's one-half share, was subject to the claim. In *Knittle v. Knittle*,[528] division one of the court of appeals affirmed the husband's separate liability and community liability for past due child support resulting from a former marriage, but modified the judgment in two ways:[529]

> It is limited to those community assets which are the result of appellant husband's earnings and accumulations. . . . It is further subject, upon a showing of necessitous circumstances by his present wife, to such adjustment and allocation of the appellant's earnings and accumulations as may appear to the trial court to be just and equitable.

However, in *Hinson v. Hinson*,[530] division three of the court of appeals concluded that the former wife's obligation of child support continued after her subsequent remarriage so that her former husband, having custody of the children, could require contribution from her one-half share of community property earned by her new husband (clearly not the "encumbered" spouse). Although somewhat startling, this result is probably sound. The fundamental idea of community property law is that the acquisitions during marriage result from the spouses working in their respective spheres. Hence, the husband's wages, though received from external sources, are in part "earned" by the wife maintaining the home. *Ergo*, there should be no necessary limitation on the enforceability of this antenuptial obligation only to wages or other income acquired by the "encumbered" spouse!

b. Federal tax liens. The antenuptial obligation based on federal tax assessments falls into its own category. Federal district court judges in Seattle have disagreed over whether the "marital bankruptcy" rule is an inherent substantive incident of community property ownership, to which *Fisch v. Marler*[531] was a particular and narrow exception,[532] or rather whether the *Fisch* case on grounds of public

528. 2 Wn. App. 208, 467 P.2d 200 (1970).
529. *Id.* at 214, 467 P.2d at 204.
530. 1 Wn. App. 348, 461 P.2d 560 (1969).
531. 1 Wn. 2d 698, 97 P.2d 147 (1939).
532. Stone v. United States, 225 F. Supp. 201 (W.D. Wash. 1963).

policy adopted an exception to the marital bankruptcy rule broad enough to include federal tax obligations.[533] Both judges agreed, however, that the marital bankruptcy rule was not to be considered as a state-created exemption against which a federal lien would prevail. The reach of the federal tax lien subsequently was resolved by the federal court of appeals[534] in favor of the federal government on two bases: (1) federal supremacy over state community property law, and (2) the interpretation that a spouse had sufficient "property" or "rights to property"[535] so that the community property asset could be sold to enforce the federal tax lien and half the proceeds of the sale applied to the antenuptial obligation.

As a result of the holdings in *Draper v. United States*[536] and *United States v. Overman*,[537] permitting the federal government to reach the debtor's half interest in community property, the problem of the character of ownership of the half not reached by the federal government will arise. The impossibility of fitting such an asset into the statutory definitions was largely the basis of the early case[538] frustrating a separate creditor's attempt to reach his debtor's half interest in the community property. No case yet answers the question how the federally enforced involuntary conversion will affect the spouses' ownership.

It would be possible to conclude that the remaining half has become the separate property of the nondebtor spouse, a result consistent with Spanish law.[539] Alternatively, it would be possible to argue that an "encumbered spouse" analysis should apply by force of state law when this involuntary conversion occurs so that both halves of the particular assets levied upon would be used to discharge the obligation; in this case there would be no distortion of rights in, or of the item theory with respect to, any assets remaining after the enforcement. Protection could be afforded to the nondebtor spouse's share, if equitable[540] or necessary, by augmenting his or her share upon total

533. Draper v. United States, 243 F. Supp. 563 (W.D. Wash. 1965).
534. United States v. Overman, 424 F.2d 1142 (9th Cir. 1970).
535. INT. REV. CODE OF 1954 § 6321.
536. 243 F. Supp. 563 (W.D. Wash. 1965).
537. 424 F.2d 1142 (9th Cir. 1970).
538. Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892).
539. *See* DEFUNIAK & VAUGHN § 165. *Compare id.* § 181.
540. Perhaps this could be done on the same basis as in the alimony, child support cases discussed *supra*.

dissolution of the community property relationship in the manner done in the "equitable lien" cases, thus refuting the argument that the nondebtor spouse would be significantly disadvantaged.

c. New statutory vulnerability of postnuptial earnings and accumulations. In 1969, the legislature amended R.C.W. § 26.16.200[541] by adding two provisos, permitting some antenuptial obligations to be enforced against subsequent acquisitions of the debtor. The first proviso subjects the *earnings and accumulations* of the husband or wife to their respective antenuptial debts. The varying phraseology of the proviso, however, poses problems. Difficulties attending the involuntary division of community property earnings, which can result from the federal tax lien cases discussed above, are avoided by the provision that the nondebtor spouse has no interest in the *earnings* of the debtor spouse (an "encumbered spouse," in effect). But nothing is said in this respect about *accumulations,* although *earnings and accumulations* are made subject to antenuptial debts. Can there be an involuntary division of accumulations? In addition, the provisos do not cover "liabilities" but only "debts," while the basic statute speaks in terms of "debts or liabilities," which may mean that the tort victim receives no assistance under this proviso. As mentioned earlier,[542] the distinction between debts and liabilities has been abandoned in some situations. The complexities are detailed elsewhere.[543]

The second proviso, requiring that the claim be *reduced to judgment* within three years of the marriage, will in some cases nullify the advantage supplied by the statute. Perhaps it would have been better

541. Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other: *Provided,* That the earnings and accumulations of the husband shall be available to the legal process of creditors for the satisfaction of debts incurred by him prior to marriage, and the earnings and accumulations of the wife shall be available to the legal process of creditors for the satisfaction of debts incurred by her prior to marriage. For the purpose of this section neither the husband nor the wife shall be construed to have any interest in the earnings of the other: *Provided Further,* That no separate debt may be the basis of a claim against the earnings and accumulations of either a husband or wife unless the same is reduced to judgment within three years of the marriage of the parties.
WASH. REV. CODE § 26.16.200 (Supp. 1973).

542. *See* text accompanying notes 448–52 *supra.*

543. *See* 45 WASH. L. REV. 191 (1970).

merely to require that the action be *commenced* within three years, as is the normal pattern for statutes of limitation. On the other hand, if a judgment is secured, it apparently will have the normal life of six years[544] so that the removal of the "marital bankruptcy" immunity could last long enough to affect many acquisitions by the debtor spouse over nearly a decade, particularly if the creditor can trace earnings and accumulations into later-acquired assets; such tracing appears permissible.[545]

B. Tort Liability

Establishing community liability in the tort area has been considerably simplified by the gradual extension of community liability for the husband's torts and by the 1972 amendments giving equal management power to the wife. These amendments make inappropriate earlier reasoning that community liability for the wife's tort depended upon the family expense statute power, the family car doctrine or her position as agent for the husband.[546]

Of course, the tortfeasor spouse is separately liable for his tort, and, similar to the contractual obligations area, the usual question is whether the community also is liable. As a general rule, if the tortious act of the spouse is committed (1) in the course of managing community property or (2) for the benefit of the marital community, there will be community liability.[547] The nonacting spouse ordinarily is not separately liable unless there would be joint responsibility if the two were unmarried.[548]

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544. WASH. REV. CODE §§ 4.56.190–.210, 6.04.010 (Supp. 1973). Enforcement process must be fully completed within the six years, *see* Ferry County Title & Escrow Co. v. Fogle's Garage, 4 Wn. App. 874, 484 P.2d 458 (1971).

545. *Cf.* West v. Stanfield, 48 Wn. 2d 55, 290 P.2d 704 (1955).

546. *See* Pruzan, *Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259 (1948).

547. These basic propositions, as previously applied to the husband's torts, are analyzed in Pruzan, *supra* note 546.

548. WASH. REV. CODE § 26.16.190 (Supp. 1973). Prior to the 1972 amendments this section referred only to injuries committed by the wife and insulated the husband, but not community property, from liability. Werker v. Knox, 197 Wash. 453, 85 P.2d 1041 (1938). The statute now makes explicit the insulation of separate property of the other spouse and covers injuries committed by either spouse. The reasoning in Werker v. Knox could support three-way liability, separate-husband, separate-wife, and community, though no separate liability against the husband was sought. *Query* whether § 26.16.190 would negate this result.

The basis of the community liability is said to lie in the principle of *respondeat superior,* even though there is no principal or master in the ordinary sense.[549] While there is greater difficulty in finding an intentional tort than a negligent tort within the ambit of the principle, the tort committed while managing or protecting a community property asset will result in community liability whether the act is negligent or intentional.[550]

Community liability has been imposed in a variety of factual situations. A continuing altercation initially related to community property interests will impose community liability.[551] An assault on a minor child in the care of a husband and wife created community liability.[552] Negligent injury occurring during a spouse's recreational activity similarly created community liability on the reasoning that the activity was beneficial and contributed to the welfare of the community relationship.[553] If the tort, *e.g.,* conversion, could confer a direct property benefit on the community, the basic community property presumption would dictate that the asset acquired would be community property, and hence the liability incurred in acquiring (or attempting to acquire) it would be a community liability.[554] Community liability attaches to tortious acts committed in connection with employment by which community funds are earned, whether or not the employment is as a public official.[555] These cases reflect the expansive reading given "re-

549. Note the rejection of the idea that there is an entity called the community in Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930).

550. *See, e.g.,* Milne v. Kane, 64 Wash. 254, 116 P. 659 (1911) (negligence in operating a community property taxi); McHenry v. Short, 29 Wn. 2d 263, 186 P.2d 900 (1947) (wilful, fatal beating in ejecting decedent from community property land or in carrying out task as caretaker of a third person's boat).

551. McHenry v. Short, 29 Wn. 2d 263, 186 P.2d 900 (1947); Benson v. Bush, 3 Wn. App. 777, 477 P.2d 929 (1970) (initially an altercation over the community dog); Blais v. Phillips, 7 Wn. App. 815, 502 P.2d 1245 (1972) (assault in parking lot directly after and as an outgrowth of a trial which concerned management of community property).

552. LaFramboise v. Schmidt, 42 Wn. 2d 198, 254 P.2d 485 (1953).

553. King v. Williams, 188 Wash. 350, 62 P.2d 710 (1936); Moffit v. Krueger, 11 Wn. 2d 658, 120 P.2d 512 (1941).

554. McGregor v. Johnson, 58 Wash. 78, 107 P. 1049 (1910); DePhillips v. Neslin, 139 Wash. 51, 245 P. 749 (1926); Henrickson v. Smith, 111 Wash. 82, 189 P. 550 (1920) (attorney kept funds received for client in settlement); Local 2618 v. Taylor, 197 Wash. 515, 85 P.2d 1116 (1938); Furniture Workers v. United Brotherhood, 6 Wn. 2d 654, 108 P.2d 651 (1940) (union officers distributed funds on disbanding local which plaintiffs, disapproving, argued was tortious).

555. Disque v. McCann, 58 Wn. 2d 65, 360 P.2d 583 (1961) (defalcation as guardian); Jacobson v. Lawrence, 9 Wn. App. 786, 514 P.2d 1396 (1973) (negligence of executor in not securing fire insurance); Kilcup v. McManus, 64 Wn. 2d 771, 394

spondeat superior" by the court, and, while properly speaking there is no presumption that a tort committed by either spouse creates community liability, few situations have arisen in which the court has not found some basis for community liability.[556] In two situations, however, the principle still leads only to separate liability of the tortfeasor: in the purely personal altercation[557] and in alienation of affection-criminal conversation conduct.[558]

1. Family car doctrine

As noted in *Werker v. Knox*,[559] the ability of the tort judgment creditor to reach community property has been enhanced by means of the family car (or family purpose) doctrine—the owner of the car is held liable on an agency theory for torts committed by the driver.[560] Community liability does not flow directly from the doctrine, but rather from the practical circumstance that the family car usually is community property and the doctrine ordinarily imposes liability on the owner.[561] Because the character of the liability resulting from application of the doctrine normally parallels the character of the ownership of the car,[562] if neither spouse is the tortfeasor, *e.g.*, if their son is the tortfeasor, the liability will only be community in the ordinary

P.2d 375 (1964) (false arrest by port commissioner-deputy sheriff–thereby abandoning the former community immunity as to "official capacity" torts).

556. *See* Werker v. Knox, 197 Wash. 453, 456, 85 P.2d 1041, 1042 (1938), where the court said "the trend of the law has not been toward relieving the community from liability for the torts of its individual members, but has been quite definitely in the direction of finding ways and means of imposing such liabilities upon the community."

557. Newbury v. Remington, 184 Wash. 665, 52 P.2d 312 (1935); Smith v. Retallick, 48 Wn. 2d 360, 293 P.2d 745 (1956); Verstraelen v. Kellog, 60 Wn. 2d 115, 372 P.2d 543 (1962). The *Benson* and *Blais* cases, *supra* note 551, indicate the "purely personal altercation" is not a broad category.

558. Aichlmayr v. Lynch, 6 Wn. App. 434, 493 P.2d 1026 (1972). *See also* Merriman v. Curl, 8 Wn. App. 894, 509 P.2d 765 (1973); Schramm v. Steele 97 Wash. 309, 166 P. 634 (1917).

559. 197 Wash. 453, 457, 85 P.2d 1041, 1042 (1938).

560. W. PROSSER, LAW OF TORTS 483–86 (4th ed. 1971) [hereinafter cited as PROSSER].

561. Perhaps more accurately, the doctrine imposes liability on the supplier of the car for use for the family purpose. *See* PROSSER at 483 *et seq.* *See also* Coffman v. McFadden, 68 Wn. 2d 954, 416 P.2d 99 (1966).

562. *See* PROSSER at 484–86.

case of community property ownership of the car.[563] The family car doctrine may also result in three-way liability (separate-husband, separate-wife and community). For example, the attendant vicarious liability can be separate if the car is separately owned by one spouse,[564] community, if the errand during which the injury occurred is community, and separate on the other spouse if that spouse is the tortfeasor.

A permanent separation, however, should prevent the doctrine's application to impose community liability. In *MacKenzie v. Sellner*[565] the automobile involved in the accident had become the wife's separate property in the property settlement made at the time of the permanent separation, so a family car doctrine argument would not extend the liability to the community. The family car doctrine also ought not apply even if the community property ownership of the car continued, because the permanent separation would eliminate the possibility of there being a *family* purpose[566] to be served by the use of the car.

2. *Torts related to management of property*

Liability imposed on a property owner, *e.g.*, liability flowing from a landowner's responsibility, will be community in character if the property responsible for the injury is community property, even if neither spouse has acted directly. Failure of the managing spouse to carry properly the responsibility of managing community property should impose individual, *i.e.*, separate, liability on the managing spouse.[567] Prior to the extension of managing power to the wife by the 1972 amendments, in *Graham v. Radford*[568] the defendant wife was held

563. *Cf.* Conley v. Moe, 7 Wn. 2d 355, 110 P.2d 172 (1941), in which the trustee in bankruptcy asserted a claim based on judgment in a wrongful death action against the husband and wife, in a community property sense only, and the son.

564. Hart v. Hogan, 173 Wash. 598, 24 P.2d 99 (1933).

565. 58 Wn. 2d 101, 361 P.2d 165 (1961).

566. *Cf.* Yates v. Dohring, 24 Wn. 2d 877, 168 P.2d 404 (1946), involving the family expense statute. But, conceivably, a community purpose might be invoked as suggested *supra*.

567. The *respondeat superior* reasoning inherently means the agent or servant is subject to liability for which the principal or master is *also* subject to liability. *See* PROSSER § 69.

568. 71 Wn. 2d 752, 431 P.2d 193 (1967).

not to be separately liable through landowner's responsibility when a child was injured upon coming in contact with a trash burner maintained on community real property. Since any liability against either the husband's separate property or the community property was barred by the plaintiff's failure to file a claim during administration of his estate following his death, the action could succeed only by establishing the wife's separate liability. The court held the wife was responsible only in a community property sense as landowner and affirmed the dismissal of the action. Because the wife had no managing power at that time, the court's refusal to find her separately liable was sound.

In this sort of situation, the effect of the 1972 amendments making each spouse equal manager may be to impose three-way liability, *i.e.*, liability on the community property and on the separate property of each spouse. The court in *Graham* stated, "the property was owned by the community, and the duty of maintenance was owed by the community."[569] However, the "community" can only perform through the act of a spouse, and arguably the failure to act or exercise proper management imposes separate liability upon the manager and liability upon the community through *respondeat superior*. If neither spouse exercised proper management, there may be liability imposed on both individually, *i.e.*, separately. There are no cases indicating whether such separate liability of the spouses would be joint, or joint and several.

That a tort related to separately-owned property will create only separate liability against the owner is reflected in *Freehe v. Freehe*.[570] While *Freehe* involved an interspousal tort,[571] a separate property-related tort against a third party plaintiff would impose separate liability on the spouse owning the property,[572] and a persuasive argument can be made for community liability on two bases if a spouse

569. 71 Wn. 2d at 755, 431 P.2d at 194.

570. 81 Wn. 2d 183, 500 P.2d 771 (1972). The court abandoned the rule of interspousal immunity.

571. In Manion v. Pardee, 79 Wn. 2d 1, 482 P.2d 767 (1971), the interspousal immunity was assumed but provided no bar for suit on a tort committed before the marriage, since, while the case was on appeal, the parties had divorced, thereby dissolving the immunity.

572. Perhaps joint and several liability, *see* Anderson v. Grandy, 154 Wash. 547, 283 P. 186 (1929).

has mismanaged property:[573] (1) the potential community benefit derivable from the spouse's labor bestowed on the separately owned property,[574] and (2) the proposition that tortious conduct of community business or affairs creates community liability.[575]

3. *Criminal responsibility*

Criminal responsibility normally results only in separate liability, but monetary liability flowing from a crime ought to be community if the "business" of the spouses is criminal and leads to liability. The court has held that costs in a criminal proceeding against the husband for arson could not be enforced against community property,[576] but the extension of tort liability to situations in which there is only a purpose to benefit or in which there is no actual *business* benefit to the community[577] may portend community liability in some criminal situations.[578]

4. *Effect of living separate and apart*

If the spouses have permanently separated, under the analysis in section III-C, personal injury caused by one will create only separate liability[579] in the actor because neither "community" benefit nor a community property purpose connected with the tort can be found if the community relationship no longer exists. If, however, the tort was committed in connection with some continuing community property management responsibility, the reasoning in the debt cases[580] would support a conclusion of community tort liability.

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573. Probably not to be found in Furuheim v. Floe, 188 Wash. 368, 62 P.2d 706 (1936), where husband's separate tort was found when he fought plaintiff over agreement to pay for surrender of separate property.

574. Consider the earnings and business profit cases in Part III *supra*.

575. Reflected, for example, in cases cited in notes 552 & 555 *supra*.

576. Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936).

577. *Cf.* the recreational benefit cases previously mentioned.

578. Thus, in Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936), the crime was committed in pursuance of a purpose to secure insurance proceeds. Although the court refused community liability because the crime was outside the scope of management, the *respondeat superior* principle may not be that restrictive anymore, as later cases seem to establish.

579. MacKenzie v. Sellner, 58 Wn. 2d 101, 361 P.2d 165 (1961). *See also* Kerr v. Cochran, 65 Wn. 2d 211, 219 *et seq.*, 396 P.2d 642, 647 *et seq.* (1964).

580. Dizard & Getty v. Damson, 63 Wn. 2d 526, 387 P.2d 964 (1964).

C. *Effect of a Tort or Contract Judgment Against One Spouse*

Prior to the 1972 amendments, if the plaintiff sought to assert community liability for the tort of the wife, it was necessary to join the husband in the action; a judgment against the wife alone would not support enforcement against community property.[581] A judgment against the husband alone, whether based on his contract or tort, was held to be presumptively a community liability on the basis that the cause of action arose from his act done presumptively as manager of community property.[582] The 1972 amendments giving the wife equal managing power should mean that a judgment against her alone for her contract or tort liability is likewise presumptively a community liability.

If one spouse is not joined in the action establishing the basic liability, that spouse (as the wife could under earlier law) should be able to challenge the asserted community character of the liability when enforcement is attempted or by bringing a quiet title action against an execution sale.[583] Properly speaking, there is no presumption that a tort liability against only one spouse is more than separate,[584] and a showing that a subsequent judgment was based only on the tort of one spouse should theoretically put the burden on the creditor to prove the community character of the judgment. However, the ease with which community tort liability is now established and the general presumption of the community character of a judgment against either spouse may put the burden on the spouse challenging the community character of the judgment. The question of the character of the liability in both tort and contract actions can be settled initially if both spouses are joined[585] or if the other spouse intervenes.[586]

581. Dolan v. Baldridge, 165 Wash. 69, 4 P.2d 871 (1931).
582. Woste v. Rugge, 68 Wash. 90, 122 P. 988 (1912); Merritt v. Newkirk, 155 Wash. 517, 285 P. 442 (1930).
583. *See, e.g.*, cases cited in note 582 *supra;* Wilson v. Stone, 90 Wash. 365, 156 P. 12 (1916); Coles v. McNamara, 131 Wash. 691, 231 P. 28 (1924).
584. *Cf.* Killingsworth v. Keen, 89 Wash. 597, 154 P.1096 (1916) (as to the wife); Strom v. Toklas, 78 Wash. 223, 138 P. 880 (1914) (as to the wife).
585. *See, e.g.*, McDonough v. Craig, 10 Wash. 239, 38 P. 1034 (1894); Anderson v. Burgoyne, 60 Wash. 511, 111 P. 777 (1910).
586. *E.g.*, Gund v. Parke, 15 Wash. 393, 46 P. 408 (1895).

D. *Effect of Death or Divorce on Previously Existing Tort or Contract Liabilities*

If the spouses divorce after a community tort or contract liability is incurred, enforcement can be had against property held by either former spouse which had been community property before the divorce, whether or not separate liability was incurred by the spouse now holding the asset.[587] Fixing the liability as between the spouses in the divorce decree or the property settlement agreement does not have any binding effect on the creditor.[588] It is preferable, though perhaps not necessary, that the creditor or injured party join both divorced spouses in any action if it is based upon community liability.[589] Any community managing power obviously ceases at the divorce, so neither spouse thereafter can create rights against the other.[590]

It is convenient to talk in terms of the community as if it were an entity[591] and of "community property" in the estate of the decedent spouse. (Upon the death of one of the spouses, however, the "entity" and the community property relationship necessarily ends.) All of the former community property is administered in the estate of the decedent,[592] and after adjustment for obligations or causes of action then enforceable against community properties and adjustment for the respective positions the spouses may have had through the "equitable lien" claim or otherwise, the net community estate to be assigned to the decedent's and the survivor's respective shares can be ascertained.

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587. McLean v. Burginger, 100 Wash. 570, 171 P. 518 (1918); Capital Nat'l Bank v. Johns, 170 Wash. 250, 16 P.2d 452 (1932); Dizard & Getty v. Damson, 63 Wn. 2d 526, 387 P.2d 964 (1964).

588. Farrow v. Ostrom, 16 Wn. 2d 547, 133 P.2d 974 (1943).

589. United States v. Elfer, 246 F.2d 941 (9th Cir. 1957); *compare* Fitch v. National Bank of Commerce, 184 Wash. 294, 50 P.2d 910 (1935).

590. *See* reasoning in Britt v. Damson, 334 F.2d 896 (9th Cir. 1964).

591. In Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930), plaintiff urged the tort cause of action survived the death of the tortfeasor spouse because the "community" still existed, as reflected in the administration of all community property interests upon the death of the tort feasor; the court rejected the argument, holding essentially there was no entity established by the community property statutes, but even accepting the argument that there was, it ceased to exist when there no longer existed both husband and wife. The survival of the cause of action has been accomplished by WASH. REV. CODE §§ 4.20.045–.046 (1963). *In re* Schoenfeld's Estate, 56 Wn. 2d 197, 351 P.2d 935 (1960), clearly involved "entity" reasoning but it is not essential to the result that community property must be devoted to settlement of community debts before separate property is.

592. WASH. REV. CODE § 11.02.070 (Supp. 1973); Ryan v. Ferguson, 3 Wash. 356, 28 P. 910 (1891).

If the surviving spouse succeeds to the decedent's share, rather than becoming tenant in common with other persons,[593] an accounting for the respective shares is not needed.

The immunity of community property to separate obligations disappears at the death of a spouse,[594] permitting separate obligations of the decedent or surviving spouse to be enforced against their respective shares of the former community property. If the decedent is separately liable on a claim, such a claim may be barred, as may a community liability, by failure to timely file within the probate nonclaim statute.[595] If the claims are properly asserted, the separate liabilities will not take precedence over community liabilities[596] but will be effective against any remaining part of the decedent's net half of the former community property.[597] If the obligation of the decedent was both separate *and* community, the creditor's claim is to be charged first against the community property being administered, without a pro-rating on the basis of the size of the respective estates.[598]

If the surviving spouse is separately liable on a claim, the creditor does not have a claim recognizable in the administration of the community estate, and therefore need not file any probate claim. The creditor subsequently may reach any assets formerly community property which become the separate property of the debtor-survivor. This last proposition has also been applied even though the creditor's claim was one which could have been enforced against either the survivor's separate property or the community property, but was not asserted in the administration of the community estate occasioned by the death of the other spouse.[599]

Individual liability for federal income taxes on community income

593. *See* Schlarb v. Castaing, 50 Wash. 331, 97 P. 289 (1908).

594. Columbia Nat'l Bank v. Embree, 2 Wash. 331, 26 P. 257 (1891); Crawford v. Morris, 92 Wash. 288, 158 P. 957 (1916); *In re* McHugh's Estate, 165 Wash. 123, 4 P.2d 834 (1931).

595. WASH. REV. CODE §§ 11.40.010 & .080 (Supp. 1973). Ruth v. Dight, 75 Wn. 2d 660, 453 P.2d 631 (1969); Graham v. Radford, 71 Wn. 2d 752, 431 P.2d 193 (1967).

596. *In re* Schoenfeld's Estate, 56 Wn. 2d 197, 351 P.2d 935 (1960).

597. *See* cases cited in note 594 *supra*.

598. *See* note 596 *supra*.

599. Rea v. Eslick, 87 Wash. 125, 151 P. 256 (1915); Roberts v. Warness, 165 Wash. 266, 5 P.2d 495 (1931). In Rea v. Eslick *supra* the court pointed out there is no relationship of principal and surety between the community estate and the separate estate. The proposition appears to be denied in Graham v. Radford, 71 Wn. 2d 752, 431 P.2d 193 (1967), holding that failure to file a claim against the community estate on which fell liability for unsafe premises owned as community property precluded assertion thereafter against the survivor (the wife) on whom there was no liability in

continues despite dissolution of the community relationship by death or divorce. If a joint return is filed, each spouse is responsible for the whole tax liability, and if no return is filed, each spouse is subject to liability for one half of the taxes owing.[600]

E. Out-Of-State Creditors

The Washington court has reversed the long-standing inequitable rules affecting obligations incurred in a noncommunity property state.[601] Under prior reasoning, an obligation incurred in a noncommunity property state was necessarily separate, because no law recognizing community property existed in that state. Therefore, when the obligation was brought to Washington for enforcement, it retained its "separate" character and could not be enforced against community property. This rule was rejected in *Pacific States Cut Stone Co. v. Goble;*[602] Washington law now provides protection for the out-of-state creditor as nearly equivalent as possible to that which the creditor would have under the applicable law of the other state.[603]

In *Pacific States Cut Stone,* the husband's Oregon contract obligation was enforced in Washington against all of the husband's acquisitions, community as well as separate, but it could not be enforced against the wife's acquisitions. Note that the wife's ordinary acquisitions in Oregon, a common law state, would be her separate property and beyond the husband's creditor's reach; but in Washington, her ordinary acquisitions would be community property, and the husband's obligation would be enforceable against the community property without regard to which spouse was the acquirer. Thus, the results obtained under the rule of *Pacific States Cut Stone* often will not be the same as those reached under exclusive Washington facts. Even if the applicable law comes from another community property state,

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the separate property sense. The case relied upon, Hennessey Funeral Home v. Dean, 64 Wn. 2d 985, 395 P.2d 493 (1964), concerns a primary-secondary quality of liability of the estate and the survivor for funeral expenses. The court's assertion in *Graham* that barring of the community claim precluded enforcement of a separate obligation, "assuming there is . . . separate liability on her part," 71 Wn. 2d at 756, 431 P.2d at 195, is an unfortunate dictum.

600. United States v. Mitchell, 403 U.S. 190 (1971). The result in Washington should be the same.

601. Pacific States Cut Stone Co. v. Goble, 70 Wn. 2d 907, 425 P.2d 631 (1967).

602. 70 Wn. 2d 907, 425 P.2d 631 (1967).

603. No attempt is made here to discuss the conflict of laws rules to determine which state's law is to be applied.

the result under Washington law will not necessarily be the same as in a "local" transaction. For example, the husband's antenuptial obligation in California can generally be enforced against community property, whereas in Washington it may not. Thus, under the *Pacific States Cut Stone* rule such a California obligation would be enforced in Washington differently than would a Washington obligation.[604] The conflict of laws rules might still bring other unanticipated results.[605]

It may be that the Washington rule adopted in *Pacific States Cut Stone,* a contract obligation case, will not be applied to out-of-state tort liabilities, although the abandoned rule was applied to both kinds of obligations and there is no sufficient reason to restrict the newly adopted rule solely to contract problems.

VII. CONCLUSION

Developments in the 19 years since the author's brief summary of Washington community property law reflect a continuing belief in the utility of a community property approach to marital property relationships. Refinements and clarifications of rules developed during this period support a desirable freedom for the spouses to tailor their property relationships as they wish. The 1972 amendments establishing management equality of the spouses may effectuate more changes in relationships with third persons than in the practical relationships within the marriage. There is a need to accommodate the normal community property rules to the disruptive effect of changes in enforcement of antenuptial obligations, including alimony and child-support responsibilities, and the overriding, arguably excessive, intrusions of federal rules under the supremacy clause. On the whole, the community property policy has been strengthened in these 19 years, but there are still possibilities for legislative corrections and protections and, of course, for further judicial refinement and clarification.

604. Wunderlich v. Cheff, Civil No. 648395 (King County Super. Ct.) summarized in 17 SEATTLE KING COUNTY B. BULL 1 (1967).

605. Pacific Finance Corp. v. J. Ed. Raymer Co., 68 Wn. 2d 211, 412 P.2d 120 (1966) (wife's guaranty contract does not bind her separate property: scope controlled by Idaho law); Potlatch No. 1 Federal Credit Union v. Kennedy, 76 Wn. 2d 806, 459 P.2d 32 (1969) (husband's suretyship liability incurred in Washington controlled by Washington law though principal obligation incurred in Idaho: no community liability).